93-843

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DAVID WAYNE BURGESS,

Petitioner,

vs.

GEORGE RYAN, as Secretary of State of the State of Illinois, and GREG O'CONNOR, as Director of the Driver's Services Department of the Office of the Secretary of State, State of Illinois,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a state, consistently with due process, summarily revoke a person's driver's license under the Interstate Driver's License Compact for the commission of a traffic offense lesser than the offense prescribed by the state statute as the threshold for such revocation because a state appellate court has characterized the effect of the lesser offense as "substantially similar" to the offense specified by the state statute as grounds for revocation?

PARTIES IN THE COURT BELOW

Petitioner, David Burgess, was the Plaintiff-Appellee, Cross-Appellant in the court below. Respondents George Ryan, as Secretary of State of the State of Illinois, and Greg O'Connor, as Director of the Driver's Services Department of the Office of The Secretary of State, State of Illinois, were the Defendants-Appellants, Cross-Appellees below.

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vs.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, David Burgess, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit reversing the grant of a preliminary injunction to Petitioner upon his complaint for declaratory and injunctive relief by the United States District Court for the Central District of Illinois, Peoria Division, (Mihm, J.).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, A1-11) is reported at 996 F.2d 180. The opinion and order of the district court (Mihm, J.) (App. B, *infra*, A12-29), is not reported. The preliminary injunction entered by the district court, App. C, *infra*, A30-43, is also not reported. The temporary restraining order entered by the district court, App. D, *infra*, A44-46, is not reported.

JURISDICTION

The judgment of the court of appeals (App. E, *infra*, A47), was entered June 14, 1993. A timely petition for rehearing was denied July 14, 1993, App. F, *infra*, A48. Petitioner thereafter filed a timely motion with this Court pursuant to Rule 13.2 of the Supreme Court Rules for an extension of time within which to file a Petition for a Writ of Certiorari. That motion was granted by this Court pursuant to an order entered by the Honorable John Paul Stevens, Associate Justice and Circuit Justice for the Seventh Circuit, App. G, *infra*, A49, extending to and including November 26, 1993, for Petitioner to file his Petition for a Writ of Certiorari. This Petition is being filed on or prior to November 26, 1993 and is, therefore, timely. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. CONSTITUTION

United States Constitution, Amendment XIV, §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

B. FEDERAL STATUTE

42 U.S.C. §1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

C. ILLINOIS STATUTES

1. 625 ILCS 5/11-501(a)2 appears as Appendix H, *infra*, A50.
2. 625 ILCS 5/6-703(a)(2) and (c), et seq., the Illinois version of the Interstate Compact is attached as Appendix I, *infra*, A51.
3. 625 ILCS 5/6-205(a)2 and (e) appear as Appendix J, *infra*, A52.
4. 625 ILCS 5/6-206(a)6 and (d) appear as Appendix K, *infra*, A53.

D. COLORADO STATUTES

1. CRS 42-2-123(1)(a) appears as Appendix L, *infra*, A54-55.

2. CRS 42-4-1202(1)(a), (b), (f), (g), and (2)(b) appear as Appendix M, *infra*, A56-57.

E. OTHER

Illinois Pattern Jury Instruction (IPI) §23.29 (Crim. 3d 1992), attached as Appendix N, *infra*, A58 (previously IPI-Crim. 2d §23.05 (1989)).

92 Ill.Admin.Code §1040.38(b) attached as Appendix O, *infra*, A59.

Notice of License Revocation attached as Appendix P, *infra*, A60-61.

STATEMENT OF THE CASE

A.

The Illinois Statutory Scheme For Revocation Of Driver's Licenses

Illinois provides its Secretary of State (Secretary) with the authority to "suspend or revoke a driver's license where a licensee has been lawfully convicted of an offense or offenses in another state . ... which if committed [in Illinois] would be grounds for suspension or revocation." 625 ILCS 5/6-206(a)6, A53, *infra*. By regulation, the revocation is mandatory for the commission of a traffic offense in another state which, if committed in Illinois, would result in revocation. 92 Ill.Admin.Code §1040.38(b). Both those provisions are, however, subject to the terms of what is known as the Interstate Driver's License Compact (Compact). 625 ILCS 5/6-206(d). A53, *infra*. The Compact is codified in Illinois at 625 ILCS 5/6-700, et seq., relevant portions of which appear at A51, *infra*. An Illinois licensee convicted of DUI in Illinois is subjected to mandatory revocation of his driver's license. 625 ILCS 5/6-205(a)2, A52, *infra*.

B.

The Interstate Driver's License Compact (Compact) As Set Forth In Illinois And The General Illinois Driving Under The Influence (DUI) Prohibition.

Illinois is one of 35 states which is a party to the Interstate Driver's License Compact. See 625 ILCS 5/6-700, Complimentary Legislation. Under the Compact at 625 ILCS 5/6-703(a), A51, *infra*, for purposes of revoking driver's licenses of Illinois licensees for driving conduct in another state, the Illinois Secretary of State is required to:

> "give the same effect to the conduct reported . . . as it would if such conduct had occurred in [Illinois] in the case of convictions for . . .
>
> > (2) [d]riving a motor vehicle while under the influence of intoxicating liquor . . . to a degree which renders the driver incapable of safely driving a motor vehicle . . . ."

The Compact further provides that:

> "if the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in paragraph (a) of this section, such party states shall construe the denominations and descriptions appearing in paragraph (a) as being applicable to and identifying those offenses or violations of a substantially similar nature, and the laws of such party states shall contain such provision as may be necessary to ensure that full force and effect is given to this section."

625 ILCS 5/6-703(c). Illinois also has a general DUI prohibition codified at 625 ILCS 5/11-501(a)2 which provides that

"a person shall not drive or be in actual physical control of any vehicle within the state while:

. . .

(2) under the influence of alcohol . . . "

That prohibition was interpreted by the Illinois Appellate Court in *Mills v. Edgar, supra,* on the basis of Illinois Pattern Jury Instruction – Criminal 2d, §23.05 (1989), A58.[1] The instruction defines DUI as driving after consumption of alcohol "when . . . [the driver's] mental or physical faculties are so impaired so as to reduce [the driver's] ability to think and act with ordinary care." Illinois creates a presumption of DUI if the alcohol concentration in the person's blood or breath is 0.10 or more. 625 ILCS 5/11-501.2(b)(3).

C.

The Colorado DUI And Driving While Ability Impaired (DWAI) Prohibitions.

Colorado, like Illinois, is a party to the Compact, codified in Colorado at CRS 24-60-1101(I), et seq. which, in material respects, corresponds to the Illinois version. Colorado also provides a general prohibition against DUI in CRS 42-4-1202(1)(f), A56, *infra,* defined as "driving when a person has consumed alcohol . . . , which . . . affects him to a degree that he is substantially incapable . . . to exercise . . . due care in the safe operation of a vehicle." In addition, Colorado has a driving offense denominated "driving while ability impaired" (DWAI), CRS 42-4-1202(1)(g), A56, *infra.* That offense is defined as "driving when a person has consumed alcohol

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[1] The IPI instruction has been recodified in IPI Crim. 3d at §23.29 (1992) and is hereafter cited as "IPI §23.29."

. . . which . . . affects him to the slightest degree so that he is less able than he ordinarily would have been, . . . to exercise . . . due care in the safe operation of a vehicle."

The Colorado DUI and DWAI provisions just defined became effective in July, 1989. Prior to that date, Colorado statutes prohibiting DUI and DWAI simply prohibited the named offenses without defining them. See CRS 42-4-1202(1)(a) and (b), prohibiting DUI and DWAI respectively. Those two offenses were, however, construed by the Colorado Supreme Court's decision in *Thompson v. Colorado*, 181 Colo. 194, 201-02, 510 P.2d 311, 314 (1973), defining DUI as impairment to a "substantial degree" and DWAI as impairment to the "slightest degree," *Id.*, without further elaboration.

Colorado creates a legal presumption of DWAI if the blood alcohol level is between 0.05 to 0.09, CRS 42-4-1202(2)(b), A56, *infra*. Colorado creates a presumption of DUI if the blood alcohol level is 0.10 or more. *Id.* A driver in Colorado is allowed up to twelve points against his driving privileges within any twelve month period. CRS 42-2-123(1)(a), A54-55, *infra*. A conviction in Colorado of DUI results in twelve points being assessed against a driver's driving privileges and a conviction of DWAI results in eight points. CRS 42-2-123(2)(b)(5)(I) and (III), A55, *infra*.

D.

The Illinois Appellate Court's Decision In *Mills v. Edgar*, 178 Ill.App.3d 1054, 534 N.E.2d 187 (Ill.App.4th, 1989).

In February, 1989, prior to Colorado's adoption of its DUI and DWAI offenses as defined in CRS 42-4-1202(1)(f) and (g), *supra*, respectively, the Illinois Appellate Court

decided *Mills v. Edgar, supra,* involving an Illinois licensee convicted in Colorado of DWAI. The Appellate Court in *Mills* held that since Illinois did not have an offense denominated, "driving while ability impaired", it was required to refer to the provisions of 625 ILCS 5/6-703(c), *supra* at 6. In doing so, the *Mills v. Edgar* court held that DWAI in Colorado was "substantially similar" to the general Illinois DUI offense set forth in 625 ILCS 5/11-501(a)2 and as defined in IPI §23.29, *supra.*

The *Mills* court did not consider the DUI offense as defined in the Compact as adopted in Illinois and codified at 625 ILCS 5/6-703(a)2, viz., "driving a motor vehicle while under the influence of intoxicating liquor . . . to a *degree which renders a driver incapable* of safely driving a motor vehicle . . . ." (Emphasis supplied). In addition, the *Mills* court recognized that "the Colorado driving while ability impaired provision cover[ed] . . . conduct which would not be considered DUI in Illinois." 534 N.E.2d at 190. The losing party in *Mills* did not seek review in the Illinois Supreme Court.

E.

Relevant Facts Applicable To This Case

Petitioner, David Burgess (Burgess), in January, 1990 was employed by Duborneco, Inc., a New York corporation, as chief of security. The company had its principal place of business and main office in New York and conducted operations throughout the United States, including Colorado. Burgess physically resided in New York in January, 1990 and performed his work, which included driving the chief executive officer of the corporation from place to place, on the strength of a driver's license issued to him by the Illinois Secretary of State, Illinois being his legal residence. In January, 1990 he was arrested and

charged in Eagle County, Colorado with DUI as defined by CRS 42-4-1202(1)(f), *supra*.

On August 13, 1990, Burgess pleaded guilty to DWAI, contrary to CRS 42-4-1202(1)(g), *supra*, ("driving while . . . affected to the slightest degree so that he was less able than he ordinarily would have been . . . to exercise . . . due care in the safe operation of a vehicle.") He was fined and discharged. At the time of his conviction upon his guilty plea, Burgess had no traffic violations within the 12 month time frames both before and after his arrest and conviction in Colorado. Had he been a Colorado licensee, his driver's license would not have been subject to revocation.

Sometime after August 13, 1990, the Colorado Division of Motor Vehicles pursuant to its obligations under the Compact reported to the Secretary that Burgess had been convicted on his guilty plea of DWAI in Colorado contrary to CRS 42-4-1202(1)(b) and (g). On January 26, 1991, the Secretary revoked Burgess' Illinois driver's license, A60-61, *infra*, "as the result of [Burgess'] conviction in another state [Colorado] for the offense of operating a motor vehicle while under the influence of alcohol and/or drugs."

The notice of revocation in those terms was facially inaccurate as Burgess had not been convicted in Colorado of "driving under the influence" of alcohol as defined in CRS 42-4-1202(1)(f) ("affect[ed] . . . to a degree that he [was] substantially incapable . . . to exercise . . . due care in the safe operation of a vehicle"). Rather, he was convicted on his guilty plea of being "affect[ed] . . . to the slightest degree so that he [was] less able than he ordinarily would have been . . . to exercise . . . due care in the

safe operation of a vehicle." CRS 42-4-1202(1)(g). However, the Secretary equated that offense with DUI as prescribed by 625 ILCS 5/11-501(a)2 and defined in IPI §23.29 ("impaired so as to reduce . . . ability to . . . act with ordinary care").

The administrative decision whether a violation from another state is "substantially similar" to the violation defined by 625 ILCS 5/11-501(a)2 is made by clerical personnel in the "coding" section of the Traffic Violations Section of the Secretary's Office.[2] It is "doubt[ful]" anyone in that section referred to the Colorado DWAI prohibition incident to the decision to issue the order revoking Burgess' Illinois license.[3] The Secretary did not know the specific prohibitions of the Colorado DWAI statute at the time he revoked Burgess' license.[4]

F.

Decisions Below

Upon receipt of the notice of revocation of his license, Burgess sued the Secretary and various officials in the Secretary's office pursuant to 42 U.S.C. §1983 challenging the revocation of his Illinois driver's license by that office. He sought preliminary and permanent injunctive relief and declaratory judgment. In particular, he asked that the court declare that to the extent 625 ILCS 5/6-703(a) and (c), App. I, *infra*, permitted the Secretary to equate Burgess' conviction of DWAI as defined by Colorado Revised Statutes 42-4-1202(1)(g), A56, *infra*,

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[2] Burgess' Appendix in Court of Appeals, 44-46.

[3] *Id.*, 46.

[4] *Id.*, 37-52, 66-69, 71-72.

with a conviction for DUI as defined by 625 ILCS 5/11-501(a)2, A50, *infra*, it violated Burgess' rights to due process, equal protection, privileges and immunities (Article IV, §2), and to engage in interstate commerce. Burgess invoked the district court's jurisdiction under 28 U.S.C. §§1331, 1343 and 2201. Burgess restricts his argument in this petition to due process.

The district court entered a temporary restraining order, A44-46, and on April 27, 1991, a preliminary injunction enjoining the Secretary from revoking Burgess' driver's license. A30-43. The Secretary filed a notice of appeal from the entry of the preliminary injunction. See 28 U.S.C. §1292. Thereafter, the matter came on before the district court on cross-motions for summary judgment at which time the district court granted Burgess' motion for summary judgment on his due process claim and at the same time entered judgment in favor of the Respondents respecting Burgess' equal protection, double jeopardy, privileges and immunities, and interstate commerce claims. The Secretary filed a new notice of appeal from the district court's final judgment on Burgess' due process claim and Burgess filed a notice of cross-appeal from the district court's judgment against him in the other respects.

The court of appeals reversed and ordered Burgess' complaint dismissed. A1-11. It held, first, that it had jurisdiction only to consider the validity of the district court's entry of a preliminary injunction in favor of Burgess under 28 U.S.C. §1292. A5-7. The court held that the remainder of the district court's judgment, App. Q, *infra*, A62, was deficient under Rules 54 and 58 Fed.R.Civ.P. as

no enforceable judgment had been entered. A5-7. Accordingly, the court held it had no jurisdiction to hear Burgess' cross-appeal. A5-7. In reversing the district court's grant of a preliminary injunction to Burgess, the court of appeals held the district court erred in that Burgess had alleged only a violation of state law which was not cognizable under §1983 as a violation of the Due Process Clause.[5] A7-9.

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[5] The court of appeals said that

"both sides must have been astonished when the district judge entered an injunction barring enforcement of the statute, and required Illinois to restore Burgess' driving privileges for a reason that Burgess had not advanced: the Illinois system violated the Due Process Clause of the Fourteenth Amendment because the hearing comes after rather than before a revocation or suspension."

A3. Far from being "astonished", due process was the primary argument Burgess made in the district court, the other arguments having been given short shrift because of the accelerated pace at which the case moved in the district court. By its "astonishment" language, the court of appeals must have been referring to the fact that Burgess stressed the notice aspect of the due process deficiency whereas in granting the preliminary injunction, the district court stressed the absence of a pre-deprivation hearing aspect of due process. Burgess had, in his complaint, alleged the two as separate due process violations.

REASONS FOR GRANTING THE WRIT

A.

THE COURT OF APPEALS' HOLDING THAT ILLINOIS' CHARACTERIZATION OF COLORADO'S LESSER DWAI PROHIBITION AS "SUBSTANTIALLY SIMILAR" TO ILLINOIS' DUI PROHIBITION THUS PERMITTING ILLINOIS, UNDER THE COMPACT, TO REVOKE ILLINOIS DRIVERS' LICENSES ON NOTICE OF CONDUCT LESS THAN THE THRESHOLD ESTABLISHED BY ILLINOIS' DUI STATUTE FOR REVOCATION CONFLICTS WITH THIS COURT'S PRECEDENTS REQUIRING, AS A MATTER OF DUE PROCESS, ADEQUACY OF NOTICE OF PROHIBITED CONDUCT RESULTING IN DEPRIVATIONS OF LIBERTY OR PROPERTY.

1.

This Court's Precedents Demonstrate That Due Process Requires Adequate Notice Of Charges Of Conduct Resulting In Deprivations Of Liberty Or Property.

The automobile has for the better part of this century been the primary means of transportation for our citizens and is as predominate a symbol of our civilization as any other artifact of technology. For a long time, but with increasing acuteness in recent years, society has recognized and addressed the ravages caused by the operation of automobiles under the influence of intoxicating substances. Most states, including Colorado and Illinois, provide for the revocation of driver's licenses of those convicted of DUI of intoxicating substances as variously defined. Few can doubt the wisdom of such provisions.

However, as illustrated by this Court's decision in *Bell v. Burson*, 402 U.S. 535, 539 (1971), loss of a driver's license can work substantial hardships in addition to radically affecting the way a person is able to live his or

her life. *Id.* It affects the ability of a person to pursue a livelihood. *Id.* This Court has made clear that revocation of driving privileges must comport with the minimal requisites of federal due process including notice and opportunity for hearing. *Id.; Dixon v. Love,* 431 U.S. 105 (1977).

In reversing the district court's preliminary injunction, the court of appeals held that Burgess had raised only questions of state law resolved by the Illinois Appellate Court's decision in *Mills v. Edgar, supra.* Burgess submits that holding erroneously permits a state court's characterization of the relationship between the two state statutes to foreclose a federal court from considering the due process effect of that characterization contrary to this Court's precedents. *Mitchell v. Wisconsin,* ___ U.S. ___, 61 L.W. 4575, 4577 (1993). That holding contravenes long-standing precedent of this Court relative to the notice constitutionally necessary to deprivations of liberty or property, including driver's licenses. *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306, 313-315 (1950); *Bell v. Burson, supra.* It has long been recognized that it is a matter of federal law whether a state procedure comports with the requisites of due process. See for e.g. *Vitek v. Jones,* 445 U.S. 480, 491 (1980). *Tulsa Professional Collection Services, Inc. v. Pope,* 485 U.S. 477, 483-85 (1988).

Precedents of this Court establish the notice necessary to convictions on guilty pleas to penal charges. For example in *Smith v. O'Grady,* 312 U.S. 329 (1941), the defendant had agreed to plead guilty to simple battery in state court. However, the court adjudicated him guilty on his plea of a form of aggravated battery containing elements different from simple battery. This Court vacated

that judgment as resulting without "real notice of the true nature of the charge . . . , the first and most universally recognized requirement of due process." *Id., supra,* 312 U.S. at 334.

Similarly, in *Henderson v. Morgan,* 426 U.S. 637 (1976), a state defendant was indicted for first degree murder, pleaded guilty to second degree murder and was sentenced. However, he was not advised and was found not to be aware that second degree murder included the intent to cause death. On that basis, this Court held the defendant had not received notice. As observed by Justice White, concurring, " 'central to the plea and the foundation for entering judgment against [a] defendant [in a criminal case] is the defendant's admission in open court that he committed the acts charged in the indictment.' " *Henderson v. Morgan, supra,* 426 U.S. at 648, quoting *Brady v. U.S.,* 397 U.S. 742, 748 (1970). That is because this Court has "consistently held that the Constitution requires a state to provide notice to its citizens of what conduct will subject them to criminal penalties and of what those penalties are." *Gilmore v. Taylor,* ___ U.S. ___, 61 L.W. 4536, 4542 (1993) (Blackmun, J., dissenting). That statement applies to lesser deprivations of property and liberty than those amounting to criminal penalties. *Bell v. Burson, supra; Mullane v. Central Hanover Bank & Trust Company, supra; Tulsa Professional Collection Services, Inc., supra.*[6]

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[6] DUI under Colorado and Illinois law is a criminal offense with specified criminal penalties. Revocation of a driver's license based on convictions of the criminal offense of DUI may be a remedial or noncriminal type penalty. Nevertheless, it does constitute a deprivation of property resulting from the commission of a criminal offense. *Bell v. Burson, supra.*

"No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, . . . are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas, supra,* 333 U.S. at 201. Therefore, "[i]t is as much a violation of due process [to subject an accused to punishment] following conviction of a charge on which he was never tried as it would be to convict him upon the charge that was never made." *Id.*, citing *De Jonge v. Oregon,* 299 U.S. 353, 362 (1937). The court of appeals' holding in this case permits Illinois and all other states party to the Compact to violate both prongs of that fundamental rule.

A requirement of federal due process is that statutes describing the offense on which charging papers are based do so with sufficient clarity to advise the person affected of the conduct prohibited. *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926); *Grayned v. City of Rockford,* 408 U.S. 104, 112 (1972); *Lanzetta v. New Jersey,* 306 U.S. 451 (1939); *Gentile v. State Bar of Nevada,* 501 U.S. ___, 115 L.Ed.2d 888, 906 (1991). Another requirement is that state courts not give novel or surprising interpretations to an otherwise clear statutory command. *Bouie v. City of Columbia,* 378 U.S. 347, 353-54 (1964); *Marks v. U.S.,* 430 U.S. 188 (1977).

What the state law defining an offense provides or which state law applies sometimes "governs the constitutional analysis." *Davis v. Scherer,* 468 U.S. 183, 193 n.11 (1984). Cf. *Hicks v. Feiock,* 485 U.S. 624, 630 (1988). A federal court is generally bound by a state's highest appellate court's interpretation of the state's own law. *Garner v. Louisiana,* 368 U.S. 157, 166 (1966). But, a federal

court is not bound by a state court's "character[ization] [of] the 'practical effect' of the [state] statute. . . . " *Mitchell v. Wisconsin*, ___ U.S. ___, 61 L.W. 4575, 4577 (1993); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983).

The losing party in *Mills v. Edgar* did not seek review of the appellate court's decision in the Illinois Supreme Court. Nonetheless, as the court of appeals did, Burgess assumes *Mills v. Edgar* correctly states Illinois law except to the extent that it did not, as it could not have, consider the relationship between the Illinois DUI prohibition and the amended Colorado DWAI statute under which Burgess was convicted.[7]

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[7] In so doing, he does not waive two other arguments he made below and which fall within the issue presented. First, the Illinois provision for revocation set forth in 625 ILCS 5/6-206(a)6 makes specific reference to the Interstate Driver's License Compact. See 625 ILCS 5/6-206(d). The Interstate Compact codified in relevant part at 625 ILCS 5/6-703(a)(2) provides an altogether different definition of DUI which will subject Illinois licensees to revocation of their licenses for conduct committed in a state party to the Interstate Compact from the general DUI prohibition set forth at 625 ILCS 5/11-501(a)2. In 6-703(a)2 the Compact advises Illinois licensees that "driving a motor vehicle while under the influence of an intoxicating liquor . . . to a degree which renders the driver incapable of safely driving a motor vehicle . . . " will subject them to revocation or suspension of their licenses if committed in another state. That is, without question, a greater offense than the offense set forth in the IPI §23.29 adopted by the appellate court in *Mills v. Edgar*, defining DUI as driving "so impaired so as to reduce [the driver's] ability to think and act with ordinary care."

It would seem that the DUI offense specified in the Interstate Compact itself is the offense of which Illinois drivers have been put on notice will subject them to loss of their driving privileges if committed in another state. Thus, the *Mills v. Edgar*

decision in disregarding the statutory elements set forth in the Interstate Compact, referring instead to the general Illinois DUI statute, 625 ILCS 5/11-501(a)2, violates the rule of this Court expressed in such cases as *Bouie v. City of Columbia, supra,* and *Marks v. U.S., supra,* as providing that novel interpretations to clear state statutes deprive individuals subject to the regulation of the statute appropriate notice.

Additionally, the *Mills v. Edgar* court's disregarding of the definition of DUI set forth in Interstate Compact as adopted in Illinois contravenes ordinary rules of statutory construction followed by the Illinois Supreme Court. See for example *Hernon v. E.W. Corrigan Construction Co.,* 149 Ill.2d 190, 195 (1992) (where two statutes are *in pari materia,* the more specific one governs); *Killeen v. Kankakee School District,* 48 Ill.2d 419, 422 (1971), if two statutes are *in pari materia* and one contains provisions omitted from the other, the omitted provisions will be applied). See also *In Re Marriage of Sutton,* 136 Ill.2d 441, 447 (1990) ("Changes in wording and phrasing when statutes are amended will be presumed to have been deliberately made"). In this respect, Illinois' general DUI statute has been repeatedly amended since first enacted in its present form in 1970. However, it has specifically never adopted the effect on driving which is specified in the DUI prohibition set forth in the Interstate Compact at 5/6-703(a)2 and which has remained unchanged since adoption in 1970.

Second, Burgess attempted to argue in the Seventh Circuit by filing a motion for leave to file a supplemental brief that the district court had concurrent, if not exclusive, jurisdiction to adjudicate issues involving constructions of provisions such as the Interstate Driver's License Compact under the federal question jurisdiction of the district court, 28 U.S.C. §1331 on the authority of such cases decided by this Court as *Cuyler v. Adams,* 449 U.S. 443, 438-442 (1981); *Carchman v. Nash,* 473 U.S. 716, 719 (1985); *U.S. Steel Corp. v. Malta State Tax Commission,* 434 U.S. 452 (1978); *Virginia v. Tennessee,* 148 U.S. 503, 519-21 (1893); *Delaware River Joint Tow Bridge Commission v. Colburn,* 310 U.S. 419 (1940). The court of appeals denied Burgess leave to file a supplemental

2.

DWAI Defined By Colorado Law Is A Lesser Offense Than DUI As Defined By Illinois' General DUI Prohibition.

By the very elements of Colorado's DWAI prohibition, CRS 42-4-1202(1)(g), and by the constitutional principles which govern what it is a person does when he pleads guilty, see for e.g. *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), Burgess cannot be held to have committed the offense prescribed by Illinois law, 625 ILCS 5/6-206(a)6, A53, referring to the offense set forth at 625 ILCS 5/11-501(a)2, A50, and defined in IPI §23.29, A58, as the threshold for revocation of driving privileges. *Henderson v. Morgan, supra; Smith v. O'Grady, supra; Jackson v. Virginia, supra; Cole v. Arkansas, supra.* That conclusion follows from an analysis of the Colorado DWAI and Illinois DUI statutes from several perspectives: First, the physical impact of alcohol on the individual the two statutes describe; second, the standard of behavior described in the two statutes; third, the legislatively mandated evidentiary presumptions and how those presumptions fit into the respective legislative schemes.

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brief. But, Burgess did articulate the argument in a footnote in his reply brief and submits here that such an argument was preserved and does fall within the ambit of the district court's federal question jurisdiction under 28 U.S.C. §1331 and is fairly contemplated by the question presented for review on certiorari.

a.

The Physical Impact Of Alcohol On The Driver Condemned By The Colorado DWAI Statute Is Lesser Than That Condemned By The Illinois DUI Statute.

Going beyond the titles of the respective statutes, the conduct sought to be regulated by the Colorado DWAI statute sweeps at a lower threshold, as acknowledged by the appellate court in *Mills v. Edgar, supra,* 534 N.E.2d at 190, than does 625 ILCS 5/11-501(a)2. The physical impact of the alcohol consumption criminalized by the Colorado DWAI statute is being "affect[ed] . . . to the *slightest* degree". (Emphasis supplied).

"It is a familiar 'maxim that a statutory term is generally presumed to have its common law meaning' ". *Evans v. U.S.,* 504 U.S. ___, 119 L.Ed.2d 57, 67 (1992), quoting *Taylor v. U.S.* 495 U.S. 575, 592 (1990). That is because a legislature "borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice . . . ". *Evans v. U.S., supra,* 119 L.Ed.2d at 67, quoting *Morrissette v. U.S.,* 342 U.S. 246, 263 (1952). Therefore, when a legislature uses words in a statute, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meanings its use will convey to the judicial mind unless otherwise instructed." *Evans, supra,* 119 L.Ed.2d at 67, quoting *Morrissette, supra,* 342 U.S. at 263. Indeed, words "[come] into the statute . . . freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion . . . . " *Du Parquet Co. v. Evanston,* 297 U.S. 216, 220 (1936). Thus, "history is a teacher . . . not to be ignored." *Id.*

Black defines "slight" as " . . . inconsiderable; unimportant; trifle; remote; insignificant." *Black's Law Dictionary*, (5th Ed. 1979), citing this Court's decision in *Moxley v. Hertz*, 216 U.S. 344, 356 (1910). In *City of Janesville v. Carpenter*, 46 N.W. 128, 131 (Wis. 1890), the court said "slight" means "inconsiderable", and "unimportant", and where used with reference to a physical injury, denotes an injury of which a court would not take cognizance. *Id.* Additionally, the terms "slight" or "slightest degree" as defining negligence are generally not construed by common law courts to permit a defendant to plead the bar of contributory negligence against a plaintiff in a negligence action. See *Newsome v. Louisville and Nashville Railroad Co.*, 102 So. 61, 64 (Ala. App. 1924). Nor, does "slight negligence . . . constitute the foundation of an action. . . . " 57 Am. Jur. 2d §241. See also *Boeing v. Shipman*, 411 F.2d 365, 372 (5th Cir. 1969), (slight negligence is "much less than the burden required to sustain recovery in ordinary tort action.")

The common law use of the adjective "slight" and the superlative "slightest" to imply "insignificance", "inconsequential", etc. to the highest degree is given additional meaning in light of statutes which, in derogation of the common law, specifically provide legal significance to, for example, "slight evidence". Thus, under FELA, 45 U.S.C. §§51, 53 and 54, a railroad employer is subject to liability for "even the slightest negligence." *Rogers v. Missouri Pacific*, 352 U.S. 500, 506 (1904); *Boeing v. Shipman, supra.* To the same effect is the Jones Act, 46 U.S.C. §688, incorporating the FELA standard holding actionable the slightest degree of negligence in modification or extension of the common law. *Mitchell v. Tawler Racer, Inc.*, 362 U.S. 539, 548-49 (1960). That point is underscored by the South

Dakota comparative negligence statute which as amended in 1964 allowed a plaintiff's "slight" negligence to be compared with the defendant's negligence in reducing a plaintiff's damages whereas before the amendment, "slight negligence", consistently with the common law rule, had no impact on a plaintiff's recovery. *Nugent v. Quam*, 152 N.W.2d 371, 376 (S.D. 1967).

Therefore, the Colorado DWAI statute must be read as modifying or extending the common law. *Rogers v. Missouri Pacific, supra.* That means that DWAI under Colorado law provides legal significance in the form of exposure to criminal liability for the most minimal effect of alcohol under circumstances where the common law would not have done so. *Rogers v. Missouri Pacific, supra; Moxley v. Hertz, supra; Evans v. U.S., supra.*

On the contrary, the Illinois DUI prohibition (A50, 58) by use of the terms, "under the influence" and "impaired" without any reference to a lesser degree necessarily imposes liability beginning at a higher threshold as those provisions do not modify or extend the common law. Black defines "impaired" as "to weaken", to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Black's Law Dictionary,* (5th ed. 1979). Thus, those terms, without the adjective "slight", must imply something beyond the "trifle", the "insignificant", the "~~un~~important" as they state an effect, to wit, "under the influence" or "impaired" of which the law takes cognizance and which by the tradition of legal understanding is measurable, significant, and important.[8]

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[8] Contrast, for example, *State v. Schmitt*, 554 A.2d 656, 669 (Vt. 1988), where the court affirmed a jury instruction which by its terms, unlike the Illinois instruction, defined "under the

The *Mills* court, after acknowledging that DWAI in Colorado covered conduct not prohibited by DUI in Illinois, seemed to imply that the Illinois jury instruction covered impairment which is even "slight". To the extent the *Mills* court did that, it did so without statutory authority or authority in the instruction itself. Thus, it created an offense not just in derogation of the common law understanding of "slight" but in derogation of the clear language of both the statute and the jury instruction. Cf. *Bouie v. City of Columbia, supra; State v. Schmitt,* n.4, *supra; Moxley, supra.*

In addition, it must be remembered that the *Mills v. Edgar* court considered Colorado's DWAI prohibition before Colorado's statute had been amended so as to define the offense. CRS 42-4-1202(1)(g). Thus, the court of appeals' decision ratifies the *Mills v. Edgar* court's characterization of the relationship between the Illinois DUI prohibition and a Colorado DWAI prohibition which was not in force at the time *Mills v. Edgar* was decided and which contains elements not contemplated by the *Mills* court. That deprived Burgess the notice due process requires. *Bouie v. City of Columbia, supra; Smith v. O'Grady, supra; Henderson v. Morgan, supra; Connally v. General Construction Co., supra; Lanzetta v. New Jersey, supra.*

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influence" as driving when the driver's "mental or physical faculties, his mental or physical ability, are diminished, impaired or affected in the *slightest* degree by intoxicating liquor". (Emphasis supplied).

b.

The Behavioral Effect Of Alcohol Proscribed By The Colorado DWAI Statute Is A Departure From A Subjective, Personal Best Norm; The Effect Proscribed By The Illinois DUI Statute Is A Departure From An Objective, Reasonable Man Norm.

After indicating that the physical impact of alcohol consumption must be to "affect[ ] [the driver] to the slightest degree", the Colorado DWAI statute then specifies the behavioral effect prohibited: render him "less able than he ordinarily would have been . . . to exercise . . . due care in the safe operation of a vehicle." The statute thus prescribes a departure from the driver's own personal best. That personal best might be higher or lower than a reasonable man, "due" or "reasonable" care standard. Thus, a "slight" departure from that personal best could still be above a reasonable man, due care standard. That is consistent with the entire scheme of the statute, to wit, prescribing that a minimal, negligible effect of alcohol is sufficient to render a driver guilty of DWAI in Colorado.

That is not the case under the Illinois DUI statutes. "Under the influence" prohibited by 625 ILCS 5/11-501(a)2 as expressed in IPI §23.29, means being "so impaired" as to result in a reduction in the driver's ability "to think and act with ordinary care." The instruction, consistently with Illinois' legislative scheme, prescribes a departure from an objective, "ordinary care" norm. The Illinois DUI statute, consequently, does not implicate the lower physical impact of being "affected to the slightest degree" rendering the driver "less able than he ordinarily would have been" to exercise due care, etc. Rather, Illinois' DUI prohibition begins at a higher behavioral threshold than the minimal "insignificant", "unimportant", "trifling", "remote" effects of alcohol

specified by the "affected in the . . . slightest degree" of the Colorado DWAI prohibition.

c.

The Legislative Presumptions Respecting The Colorado DWAI Statute And The Illinois DUI Statute Confirm That The Former Makes Criminal A Lower Threshold Of Alcohol Affected Driving Conduct Than Does The Latter.

CRS 42-4-1202(2)(b) creates a legal presumption of DWAI if the blood alcohol is between 0.05 to 0.09. In Illinois, the statute creates a legal presumption of DUI if the alcohol concentration is 0.10 or more. 625 ILCS 5/11-501.2(b)(3). *Mills v. Edgar*, 178 Ill.App.3d at 1057. Those presumptions confirm the *Mills* court's conclusion that the Colorado DWAI statute makes criminal driving behavior at a lower threshold than the behavior criminalized by the Illinois DUI statutes. Moreover, those presumptions are consistent with the respective legislative schemes whereby Colorado's DWAI prohibition has criminalized lesser alcohol affected driving conduct than the Illinois DUI prohibition.

3.

The Court Of Appeals, In Reversing The District Court's Preliminary Injunction, Subjected Petitioner To A Deprivation Of Property Without Constitutionally Sufficient Notice Of Conduct Which Would Result In Such Deprivation.

In *Bell v. Burson*, 402 U.S. 535, 539, 542 (1971), the Supreme Court held that driving privileges conferred by a state were property protected by due process thus

requiring " 'notice and opportunity for hearing appropriate to the nature of the case' *before* the termination [became] effective". (Emphasis in original). That was true because a fact question existed as to whether there was a reasonable possibility of a judgment against petitioner in the context of Georgia's financial responsibility law. *Id.*

But, in *Dixon v. Love*, 431 U.S. 105 (1977), the Court held that the Illinois' summary revocation scheme was consistent with due process on authority of the calculus provided in *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Court said that when automatic revocation of a driver's license depends on the determination of the occurrence of *uncontested* prescribed events, there were no facts to adjudicate and thus no justification for a pre-termination hearing. *Dixon, supra*, 431 U.S. at 113.

The reasons why a pre-termination hearing was not constitutionally required in *Dixon v. Love, supra*, are the reasons the district court correctly held it was required in this case. The Secretary concluded Burgess had been convicted of the equivalent of DUI as defined by Illinois law. As demonstrated, *supra*, that is an offense which he did not admit committing on his guilty plea to DWAI in Colorado. There are distinct dissimilarities between DWAI in Colorado and DUI in Illinois. Therefore, a pre-termination hearing would be required to determine if Burgess' Colorado conduct rose to the threshold set forth in the DUI prohibition so as to subject him to the consequences of having committed that conduct. *Bell v. Burson, supra.*

B.

THE COURT OF APPEALS' HOLDING THAT ILLINOIS' CHARACTERIZATION OF COLORADO'S LESSER DWAI PROHIBITION AS "SUBSTANTIALLY SIMILAR" TO ILLINOIS' DUI PROHIBITION THUS PERMITTING ILLINOIS, UNDER THE COMPACT, TO REVOKE ILLINOIS DRIVERS' LICENSES ON NOTICE OF CONDUCT LESS THAN THE THRESHOLD ESTABLISHED BY ILLINOIS' DUI STATUTE IN VIOLATION OF DUE PROCESS CONFLICTS WITH THE EIGHTH CIRCUIT'S DECISION IN *COKELEY v. LOCKHART*, 951 F.2d 916 (8TH CIR. 1991).

The Eighth Circuit in *Cokeley v. Lockhart, supra,* reached the exact opposite result from what the Seventh Circuit reached in this case under analogous circumstances. Cokeley had been charged with "having 'willfully, unlawfully and feloniously engage[d] in sexual intercourse . . . by compulsion' in violation" of an Arkansas statute. *Cokeley v. Lockhart, supra,* 951 F.2d at 917. The statute pursuant to which he had been so charged provided that "a person commits rape if he engages in sexual intercourse or defiant sexual activity with another person: (1) by forcible compulsion;. . . . "

The evidence at Cokeley's trial indicated that he had engaged in oral sex. That evidence prompted the trial judge to instruct the jury on rape by "deviant activity" as well as by sexual intercourse. But, prior to Cokeley's being charged, tried and convicted, the Arkansas Supreme Court in *Clayborn v. State,* 278 R.533, 647 S.W.2d 433 (1983), had divided Arkansas' rape prohibition into two separate offenses, viz., rape by sexual intercourse and rape by deviant sexual activity. The Arkansas Supreme Court upheld Cokeley's conviction saying that "the Arkansas rape statute 'provides for just one offense

of rape with two different [means] of commission' ". *Cokeley v. State*, 705 S.W.2d 425, 426 (Ark., 1986), quoted from *Cokeley v. Lockhart, supra*, 951 F.2d at 919.

On habeas corpus, the Eighth Circuit noted that the Arkansas Supreme Court's holding in *Cokeley* "would appear to resolve the issue on appeal in the state's favor because federal courts considering habeas petitions must apply the state court's interpretation of state law." *Cokeley, supra*, 951 F.2d at 919. But, the court then said, consistently with this Court's decision in *Mitchell v. Wisconsin, supra*, that "although the interpretative gloss on a statute may bind [the federal court] as a matter of statutory construction, federal courts are not similarly bound as to the constitutional effect of that construction." *Cokeley, supra*, 934 F.2d at 919.

There is an arguable point of distinction between the Eighth Circuit's decision in *Cokeley, supra*, and the Seventh Circuit's decision in this case. The Arkansas Supreme Court had in *Clayborn, supra*, prior to Cokeley's conviction, interpreted the Arkansas rape statute as providing for two distinct offenses. But, there is an analog in this case which eliminates that potential distinction: The Colorado DWAI and DUI statutes were amended so as to be statutorily defined after the Illinois Appellate Court's decision in *Mills v. Edgar, supra*, and before Burgess' conduct.

The Seventh Circuit in this case ignored that amendment. It thus ignored that this case is in the same posture as *Cokeley v. Lockhart, supra*. This case, therefore, presents this Court with a sharply etched conflict between the Seventh and Eighth Circuits on an important question of adequacy of notice of conduct which will subject an individual to a significant deprivation of property or liberty.

Mullane, supra; Smith v. O'Grady, supra; Henderson v. Morgan, supra. This case is well suited to enable this Court to resolve that conflict.

C.

THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORT AS IT AFFECTS ALL THIRTY-FIVE STATES PARTY TO THE COMPACT AND, AS THE COURT OF APPEALS RESOLVED THIS CASE, PERMITS THE COURTS OF THE VARIOUS HOME STATES TO THE COMPACT TO REVOKE HOME STATE DRIVERS' LICENSES FOR CONDUCT LESSER THAN THE THRESHOLD PRESCRIBED BY THE HOME STATE FOR REVOCATION WITHOUT CONSTITUTIONALLY ADEQUATE NOTICE OF PROHIBITED CONDUCT RESULTING IN DEPRIVATIONS OF LIBERTY OR PROPERTY.

The importance of the issue presented in this case, affecting thirty-five states to the Compact, is manifest. The "substantially similar" language appears in all versions of the statutes of the states party to the Compact. Clearly, many of the offenses specified by the party states resulting in revocation or suspension of licenses bear some similarity to those specified at 625 ILCS 5/6-703(a)1-5. Often that similarity will be sufficiently similar so as to afford constitutionally adequate notice. Indeed, there is no question that Colorado's DUI prohibition, CRS 42-4-1202(1)(f), A56, *infra*, and Illinois' DUI prohibition (A50, 58) are sufficiently "substantially similar" that commission of one amounts to a commission of the other.

But, the same cannot be said respecting the prohibitions of Colorado's DWAI and Illinois' DUI statutes. Therefore, this case would enable this Court to provide meaningful guidance on an issue, national in scope,

fraught with the potential for deprivations of property and liberty without constitutionally sufficient notice.

D.

THIS CASE PRESENTS THIS COURT WITH A USEFUL OPPORTUNITY TO RESOLVE THE ISSUE LEFT OPEN IN *HENDERSON V. MORGAN*, 426 U.S. 637, 647 n.18 (1976), AS TO THE EXTENT TO WHICH " . . . NOTICE OF THE TRUE NATURE OR SUBSTANCE OF A CHARGE . . . REQUIRES A DESCRIPTION OF EVERY ELEMENT OF THE OFFENSE. . . . "

There is no question that Colorado's DWAI prohibition is "similar" to Illinois' DUI prohibition in that it condemns drinking related driving. But, that does not make it an equivalent prohibition whereby guilt of DWAI necessarily implies guilt of DUI under Illinois law. *Smith v. O'Grady, supra; Henderson v. Morgan, supra; Mullane, supra.* This case, therefore, presents this Court with an opportunity to address the issue specifically left open in *Henderson v. Morgan, supra,* 426 U.S. at 647 n.18, as to "whether notice of the true nature, or substance of a charge always requires a description of every element of the offense. . . . " *Henderson v. Morgan, supra.*

CONCLUSION

For the reasons above stated, Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted:

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APPENDIX A

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Nos. 91-2131, 91-2870, 91-2995, and 91-3281

DAVID WAYNE BURGESS,

Plaintiff-Appellee, Cross-Appellant,

v.

GEORGE RYAN, Secretary of State of Illinois, and GREG O'CONNOR, Director of the Driver Services Department,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Central District of Illinois, Peoria Division.
No. 91-1032 – **Michael M. Mihm,** *Chief Judge.*

ARGUED APRIL 16, 1993 – DECIDED JUNE 14, 1993

Before COFFEY, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Drivers who violate traffic laws frequently, or commit a single serious infraction, lose their licenses in Illinois. Three convictions within a year for speeding, or one for driving under the influence of alcohol, produce automatic revocation. 625 Ill. Comp. Stat. § 5/6-205(a); 92 Ill. Admin. Code § 1040.38(a). A driver who believes that state officials erred in determining the number or gravity of his offenses is entitled to a hearing, but only after the revocation has taken effect. 625

Ill. Comp. Stat. §§ 5/2-118, 118.1 Such a driver may seek an interim permit, readily available to persons whose employment requires an ability to drive and who have not previously been convicted of driving under the influence of alcohol or other drugs. 625 Ill. Comp. Stat. §§ 5/6-205(c), 206.1(a). In 1976 a district court held that the Illinois scheme offends the due process clause of the Constitution because the hearing comes after rather than before the revocation. The Supreme Court reversed, concluding that a subsequent hearing suffices. *Dixon v. Love*, 431 U.S. 105 (1977). See also *Mackey v. Montrym*, 443 U.S. 1 (1979). Fourteen years later, in this case, a district court held that the Illinois scheme offends the due process clause of the Constitution because the hearing comes after rather than before the revocation.

The only difference is the location of the traffic offense. Love was convicted in Illinois, David Wayne Burgess in Colorado. Arrested while driving 61 M.P.H. in a 35 M.P.H. zone, and charged with speeding, driving under the influence of alcohol (DUI), and driving while ability impaired (DWAI), a lesser degree of impairment. Colo. Rev. Stat. § 42-4-1202(1)(b). Burgess pleaded guilty to the DWAI charge, and the other two were dismissed as part of the plea bargain. This conviction would not have cost Burgess his right to drive had he possessed a Colorado license. Colo. Rev. Stat. § 42-2-123(5)(b)(III). But his license had been issued by Illinois, which does not recognize degrees of impairment. Under the Interstate Driver License Compact, Colorado reported the conviction to Illinois, which revoked Burgess' license. The notice informing Burgess of this action stated that the justification was a conviction for "DUI/Alcohol" in Colorado. The

Compact requires each state to give a conviction in another state "the same effect . . . as it would [have had] if such conduct had occurred in the home state". 625 Ill. Comp. Stat. § 5/6-703(a). See also 625 Ill. Comp. Stat. § 5/6-206(a)(6). The administrative apparatus of Illinois has concluded that the Colorado offense of driving while ability impaired is most like the Illinois offense of driving under the influence of alcohol, and a state court has agreed. *Mills v. Edgar*, 178 Ill. App. 3d 1054, 534 N.E.2d 187 (4th Dist. 1989). If *Mills* is correct, then the Secretary of State does not possess any discretion in a case such as Burgess'; conviction of driving while ability impaired in Colorado leads straight to revocation in Illinois.

Instead of seeking a post-revocation administrative hearing, requesting a temporary permit, or asking a state court to take a fresh look at the equivalence of Colorado and Illinois offenses, Burgess filed this suit under 42 U.S.C. § 1983. According to Burgess Illinois' action violated seven provisions of the Constitution, from the double jeopardy clause to the full faith and credit clause. Both sides must have been astonished when the district judge entered an injunction barring enforcement of the statute, and requiring Illinois to restore Burgess' driving privileges, for a reason that Burgess had not advanced: that Illinois' system violates the due process clause of the fourteenth amendment because the hearing comes after rather than before a revocation or suspension.

The district court treated *Dixon* as if it required a case-by-case inquiry into the weight of the interests involved and the utility of a hearing. The court believed that Burgess' interest as a chauffeur is especially weighty and that the risk of error in establishing a correspondence

between one state's rules and another's is especially high, leading to the conclusion that a hearing should precede the administrative decision. But *Dixon* vindicated the constitutionality of Illinois' statutory system, not simply of its application to a particular driver. *Dixon* employed the method of *Mathews v. Eldridge*, 424 U.S. 319 (1976), which remarked: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Id.* at 344. Person-specific variations do not cause an otherwise-proper system of procedure to violate the Constitution. And at all events the considerations that the district court emphasized, such as Burgess' need to drive in order to remain employed, hardly distinguish *Dixon*. Love was a truck driver! 431 U.S. at 110. The Court wrote:

> The Illinois statute includes special provisions for hardship and for holders of commercial licenses, who are those most likely to be affected by the deprival of driving privileges. . . . We therefore conclude that the nature of the private interest here is not so great as to require us "to depart from the ordinary principle . . . that something less than an evidentiary hearing is sufficient prior to adverse administrative action."

431 U.S. at 113, quoting from *Eldridge*, 424 U.S. at 343. The Court added that the risk of error is low because the process is mechanical – not zero, because reports of convictions may be erroneous or may be misinterpreted, but low. So here. The risk is low – not zero, because *Mills* may be wrong, but low. A system offering prior hearings in every case on account of the risk of error in a few cases would reduce safety, the Court thought, by permitting

dangerous drivers to remain on the road and encouraging them to bog down the system by flooding it with requests for hearings. 431 U.S. at 114. That observation is no less true today than it was when the Supreme Court wrote; the Illinois system is not less constitutional today than it was in 1977.

Thus we arrive at a sticking point. What becomes of the arguments Burgess actually made? After the district court issued a preliminary injunction, Burgess asked the court to make the relief permanent, reiterating the seven constitutional theories originally adduced. The district court wrote an opinion rejecting Burgess' contentions. That left the court's own due process theory as the sole support for declaratory and injunctive relief. Instead of entering an appropriate declaratory judgment or injunction, however, the court filed a judgment that reads in full:

> IT IS ORDERED AND ADJUDGED judgment is entered in favor of the Defendants and against the Plaintiff on the privileges and immunities claim, the equal protection claim, and the double jeopardy claim. Further ordered that judgment is entered in favor of the Plaintiff and against the Defendants on the due process claim.

No declaratory judgment, no injunction appropriate under Fed. R. Civ. P. 65(d). Both sides appealed from this document, and the defendants appealed from a later order awarding attorneys' fees to Burgess under 42 U.S.C. § 1988. Add the defendants' appeal from the preliminary injunction, and we have four appeals.

Just as every state must adhere to constitutionally mandatory procedures, ever judge must adhere to the procedures established by federal rules and statutes. Rule 65(d) instructs judges to specify precisely what they require of the litigants. "[J]udgment is entered in favor of the Plaintiff and against the Defendants on the due process claim" is less useful even than the judgment held inadequate in *Schmidt v. Lessard*, 414 U.S. 473 (1974). "[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Id.* at 476. Even declaratory judgments, which are not enforced by contempt, must be spelled out so that the parties may know their rights. *Azeez v. Fairman*, 795 F.2d 1296 (7th Cir. 1986); *Foremost Sales Promotions, Inc. v. Director, BATF*, 812 F.2d 1044 (7th Cir. 1987). Precision is especially important here, for Burgess' different theories carry different implications. The double jeopardy theory, for example, implies that the state's entire system of revoking licenses for traffic convictions is unconstitutional because loss of one's license is a forbidden additional penalty for crime, while the full faith and credit theory implies only that Illinois must give the Colorado judgment the same effect that Colorado would give it. The "due process claim" to which the court referred could mean anything; Burgess invoked the due process clause, although not to the same end as the district judge.

Schmidt holds that inadequate specificity in an injunction does not scuttle appellate jurisdiction. See also *Alpine State Bank v. Ohio Casualty Insurance Co.*, 941 F.2d

554 (7th Cir. 1991). Cf. *Bates v. Johnson*, 901 F.2d 1424 (7th Cir. 1990) (oral judicial demand, unaccompanied by any written order, is neither enforceable nor appealable). But *Schmidt* declined to address the merits of the case, remanding so that the district court could comply with Rule 65(d). See also *Azeez*, holding that failure to enter a declaratory judgment is the same as denying the request for one. Remanding after the fashion of *Schmidt* would unduly prolong this case, which began early in 1991. A more palatable alternative is to treat Burgess' current contentions as arguments in support of the preliminary injunction, which complies with Rule 65(d) and over which we have jurisdiction by virtue of the defendants' appeal No. 91-2131. An appeal from a preliminary injunction usually becomes moot once the district court grants or denies permanent relief, but the district judge has yet to displace the preliminary injunction with a proper permanent injunction. The preliminary injunction remains the only statement of what the district judge expects the defendants to do. We conclude, therefore, that the preliminary injunction remains in force. Whether it should endure depends on the validity of Burgess' arguments.

Behind many of Burgess' arguments lies a conclusion that employees of Illinois misunderstand Illinois law. Burgess believes that the Illinois offense of driving under the influence of alcohol is not equivalent to the Colorado offense of driving while ability impaired. Yet it is not appropriate for a federal court, hearing a case under § 1983, to upbraid state officials for a supposed error of state law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 106 (1984). Burgess was free to take his contentions to state court (although presumably he would

want to avoid the fourth appellate district, which in *Mills* agreed with the Secretary of State's interpretation). A federal judge, by contrast, must assume that the state officials' interpretation is right – not necessarily because it *is* correct (the Supreme Court of Illinois might disagree with *Mills*) but because errors in the interpretation of state law do not supply a basis for federal relief. Constitutional adjudication tests the *power* of a state to act in a particular way; whether the state indeed wishes to act in that way is a question of its domestic law. The Constitution does not require states to administer their laws correctly. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 202 (1989); *Nordlinger v. Hahn*, 112 S. Ct. 2326, 2335 n.8 (1992); *id.* at 2339-41 (Thomas, J., concurring); *Archie v. Racine*, 847 F.2d 1211, 1215-18 (7th Cir. 1988) (in banc); *Saukstelis v. Chicago*, 932 F.2d 1171 (7th Cir. 1991). Blunders in the implementation of state law are inevitable; state courts provide the remedy. See *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990) (in banc); *Pacelli v. DeVito*, 972 F.2d 871 (7th Cir. 1992). To receive relief for an error of state law, a party must make a claim under the state law itself, as in diversity litigation. But Burgess and the defendants are not of diverse citizenship, and an exercise of supplemental jurisdiction under 28 U.S.C. § 1367 would be inappropriate. Burgess should have taken his grievance to state court, where all problems could have been ironed out long ago.

To prevail under § 1983 Burgess must show that Illinois' system is unconstitutional even when properly carried out. Yet on this approach his arguments are insubstantial. Burgess has abandoned most of them (his brief does not mention the double jeopardy or full faith and

credit clauses, for example). At oral argument his lawyer conceded that a state law expressly providing for revocation of the license of anyone convicted of any motor-vehicle drug or alcohol offense would satisfy the Constitution as he understands it. Burgess denies that Illinois has such a law, but the denial depends on his disagreement with *Mills*. If that case is correct, then the Illinois statutory scheme has exactly the structure Burgess says is sufficient, although it lacks the degree of clarity Burgess prefers. Recasting the argument as one about the adequacy of notice – Colorado did not tell Burgess what would happen to his Illinois license, and Illinois did not brief its drivers on the risks of violating other states' laws – adds nothing. Criminal charges need not detail the civil consequences of convictions, and statutes do not become unconstitutionally vague just because they require judicial interpretation. That the details for matching the two states' offenses appear in the law reports rather than the statute books is constitutionally irrelevant. *Rose v. Locke*, 423 U.S. 48 (1975).

Only a few words are necessary to mop up the remaining arguments. Burgess contends that Illinois violates the equal protection clause of the fourteenth amendment, and the privileges and immunities clause of Art. IV § 2, by permitting persons holding Colorado drivers' licenses to use its streets, although he cannot. Colorado does not revoke the licenses of persons convicted of driving while ability impaired; Illinois does. But what has this to do with equal protection? Illinois has not drawn any irrational classification; it has a uniform response to convictions for driving under the influence of alcohol, a response that disregards the location of the offense. That

is the point of ¶ 6-703: one rule applies to all holders of Illinois licenses, no matter the jurisdiction of conviction. Burgess appears to believe that under the Constitution all states must employ the same rules. If Colorado believes that a person convicted of driving while ability impaired is still fit to hold a license, Illinois must follow the same rule. At oral argument counsel referred to states' disparate reactions to driving under the influence of alcohol as "the federalism problem." He was unfazed by the court's reminder that federalism is not a "problem" but a feature of the national confederation. Freedom to move from one state to another in search of a preferable legal system – to use exit as well as voice – is an important element of liberty and source of pressure on government to improve the law. Burgess, a citizen of Illinois, may not insist that Illinois give him a license to drive just because Colorado, or Alaska, or any other state would do so. As for the privileges and immunities clause: there might be a problem if Illinois refused to permit holders of Colorado licenses to use the roads of Illinois, cf. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988), but this part of the Constitution does not require homogeneous state laws. It curtails states' ability to discriminate against non-citizens, but Illinois has not discriminated against citizens of Colorado (of whom Burgess is not one, anyway). Virginia was free after *Friedman* to establish qualifications for membership in the Virginia Bar; Illinois is free to establish its own qualifications for driving, and these need not match Colorado's.

The preliminary injunction is reversed, and the case is remanded with instructions to enter judgment for the defendants. Because Burgess is no longer the prevailing

party, the award of attorneys' fees, the subject of appeal No. 91-3281, is no longer appropriate and is reversed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DAVID WAYNE BURGESS, Plaintiff, v. GEORGE RYAN, Secretary of State of the State of Illinois, and STEVEN B. SCHNORF, as Director of the Drivers Services Department of the Office of the Secretary of State, State of Illinois, Defendants.	)	Case No. 91-1032 (Filed Jul 15, 1991)

ORDER

Before the Court are Cross-Motions for Summary Judgment by the Plaintiff and by the Defendants (#25 and #31). The Court grants in part and denies in part the Plaintiff's Motion for Summary Judgment (#25). Also, the Court grants in part and denies in part the Defendant's Motion for Summary Judgment (#31).

BACKGROUND

Previously, this Court entered an order on April 24, 1991, which granted the Plaintiff's request for a preliminary injunction because this Court found that Burgess had been deprived due process in being denied a predeprivation hearing before his license was taken by the

state. This order set forth the necessary background facts at pages 1 through 6.

JURISDICTION

Burgess is seeking to redress an alleged deprivation of his due process and equal protection rights under the Fourteenth Amendment of the United States Constitution and his rights, privileges and immunities secured by Article IV, Sections 1 and 2 of the United States Constitution pursuant to 42 U.S.C. §1983. Specifically, Burgess is challenging the constitutionality of the Defendants' application of the Interstate Compact, Ill.Rev.Stat. ch. 95½, §6-701 *et seq.*, in revoking his license. This Court has federal question jurisdiction under 28 U.S.C. §§1331 and 1343(3). Further, the Court has jurisdiction under 28 U.S.C. §2201 as Burgess is bringing this action as a declaratory action regarding his rights under the United States Constitution.

I. The Due Process Claim

For the reasons stated in the hearing on the Motion for a Preliminary Injunction, and for the reasons stated in this Court's order of April 24, 1991, this Court believes that Burgess is entitled to summary judgment on his due process claim (see pp. 6-13 of the Court's order entered on April 24, 1991 granting Burgess a preliminary injunction). Also, for these same reasons, this Court believes that Burgess is entitled to a predeprivation hearing. *See, Mathews v. Eldridge*, 474 U.S. 319 (1976).

II. The Privileges and Immunities Clause Claim

Burgess asserts that the Defendants' conclusion that he was guilty of driving under the influence solely on the basis of his Colorado conviction[1] will deny him the privilege and immunity of driving on the public streets and highways in Colorado while permitting similarly situated Colorado licensees to drive. Burgess contends that this violates the privileges and immunities clause of Article IV, Section 2 of the United States Constitution. Article IV, Section 2 of the Constitution provides in relevant part:

> The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

The Defendants contend that the Supreme Court has held that the privileges and immunities clause did not incorporate the Bill of Rights or protect individual rights of citizens other than those rights arising from being a federal citizen. *Slaughter House Cases,* 83 U.S. 36 (1873). Further, the Defendants maintain that the states may limit individual rights as long as it does not infringe upon the rights of federal citizenship such as voting in federal elections. *Id.*

This Court must reject the Defendants' arguments because the *Slaughter House Cases,* 83 U.S. 36, dealt with the privileges and immunities clause of the Fourteenth Amendment to the United States Constitution and not

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[1] Burgess pled guilty to the charge of driving while ability impaired in Colorado. *See,* CRS 42-4-1202(1)(b) and 42-4-1202(1)(g).

with the privileges and immunities clause of Article IV, Section 2 of the United States Constitution.

Although the Defendants have not raised this point, this Court believes that Burgess does not have standing to raise the privileges and immunities claim. Burgess has submitted no evidence that he has applied for a license in Colorado or that he would be otherwise eligible for a license from Colorado.[2]

Assuming that Burgess has established standing or can establish standing, Burgess asserts that he has established a privileges and immunities violation based on the case of *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). In *Friedman*, the United States Supreme Court considered a Supreme Court rule of the State of Virginia which authorized a lawyer who had been admitted to practice in another state to be admitted to the Virginia bar on motion without having to take the state's bar examination, but required that the applicant be a permanent resident of Virginia. The Court addressed the residency requirement in response to a privileges and immunities attack.

The Supreme Court concluded that the purpose of the privileges and immunities clause of Article 4, Section 2 was as follows:

> The provision was designed "to place the citizens of each state upon the same footing with

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[2] There is no evidence in the record that Burgess is a citizen of Colorado or that he otherwise resides in Colorado so that he would be entitled to a license in Colorado. Further, no authority has been submitted on the licensing requirements in Colorado.

> citizens of other states, so far as advantages resulting from citizenship in those states are concerned." *Paul v. Virginia*, 8 Wal. 168, 180 (1869). *See also, Toomer v. Witsell*, 334 U.S. 385, 395 (1948) (the privileges and immunities clause "was designed to insure to a citizen of state A who ventures into state B the same privileges which the citizens of state B enjoy").

Id. at 64. The Court went on to make clear that for analytic purposes, citizenship and residency were essentially interchangeable. *Id.*

The Court then stated that a two-step inquiry is required to determine whether a citizenship or residency classification offends privileges and immunities. The first question is whether the activity in question is sufficiently basic to the livelihood of the nation to fall within the purview of the privileges and immunities clause. *Id.* Second, if the challenged restriction deprives non-residents of a protected privilege, the Court concluded that it would invalidate that restriction only if it concluded that the restriction was closely related to the advancement of a substantial state interest. *Id.* at 65.

In making the two-step inquiry, the Supreme Court concluded that the practice of law was the pursuit of a common calling and was therefore one of the most fundamental privileges protected by the clause. *Id.* at 65-67. Under the second prong of the clause, the Court stated that:

> The clause does not preclude disparity in treatment where substantial reasons exist for the discrimination and the degree of discrimination

> bears a close relationship to such reasons. (Citation omitted). In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the state, the Court has considered whether, within the full panoply of legislative choices otherwise available to the state, there exists alternative means of furthering the state's purpose without implicating constitutional concerns. (Citation omitted).

Id. at 67. The Court concluded that the Virginia Supreme Court's requirement was unjustified because there were less restrictive alternative means which could be used to fully-and adequately protect whatever interest the state might have had in its restriction. *Id.* at 67-70.

In this case, the Interstate Drivers License Compact provides that:

> Upon application for a license to drive, the licensing authority in a party state shall ascertain whether the applicant has ever held, or is the holder of a license to drive issued by any other party state.

See, CRS 24-60-1101V.[3] Under the compact, the licensing authority in the state where the application is made is required not to issue a license to drive to the applicant if:

> 1. The applicant has held such a license but the same has been suspended by reason, in whole or in part, of a conviction for a violation and if such suspension has not been terminated.
>
> 2. The applicant has held such a license, but for the same has been revoked by reason, in

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[3] In Illinois, the corresponding provision is Ill.Rev.Stat. ch. 95½, §6-704.

> whole or in part, of a conviction for a violation and if such revocation has not terminated, except that after the expiration of one year from the date the license was revoked, such person may make application for a new license if permitted by Colorado law. The licensing authority may refuse to issue a license to any such applicant if, after investigation, the licensing authority determines that it will not be safe to grant such person the privilege of driving a motor vehicle on the public highways.

Id.

Burgess asserts that the implication of the foregoing provision is that, if he were to apply for a vehicle operators license in Colorado, he would not be able to secure one. He suggests that the above assertion is true, notwithstanding the fact that a Colorado licensee similarly situated as he who was convicted of driving while ability impaired in Colorado would be fully authorized to operate a motor vehicle on the public streets and highways of Colorado. Further, Burgess notes that, by being deprived of his license in Illinois, he would not be able to lawfully drive on the streets and highways of Colorado, despite the fact that a Colorado licensee similarly situated could legally drive.

This Court does believe that driving is an activity which is sufficiently basic to the livelihood of individuals in society to satisfy the first prong of the test in *Friedman*. As Burgess asserts, it is long established that the right of interstate travel is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment. *See, Shapiro v. Thompson*, 394 U.S. 618 (1969); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-256 (1974). It is also

true that the right of intrastate travel is a fundamental right secured as part of our liberty under the Due Process Clause of the Fourteenth Amendment. *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Lutz v. City of York, Pennsylvania*, 899 F.2d 255, 258-262 (3rd Cir. 1990). Further, it is clear in this case that depriving Burgess of a license deprives him not only of the opportunity to drive, but also it deprives him of the ability to perform his occupation as a chauffeur.

Regarding the second prong of the privileges and immunities inquiry (whether the restriction on the non-residence privilege is closely related to the advancement of a substantial state interest), Burgess asserts that it is clear that Colorado does not have a substantial state interest here because Colorado would have never taken away Burgess's driving privileges in the first place. *See*, CRS 40-3-123.

It is true that the fact that Colorado would not have taken away Burgess's driving privileges tends to show that Colorado does not have a substantial interest. However, Colorado is not a party in this case to argue what other interests it might have in abiding by the Interstate Compact. This point relates back to the standing issue discussed earlier. If Burgess was otherwise eligible for a license in Colorado or if he applied there, and if he was denied a license, then Colorado would have an opportunity to make these arguments. In sum, this Court concludes that Burgess does not have standing to assert his privileges and immunities claim and this Court believes

that Colorado does have a substantial interest in abiding by the Interstate Compact.[4]

III. The Equal Protection Claim

In *Miller v. Carter,* 547 F.2d 1314 (7th Cir. 1977), the Seventh Circuit struck down on its face as being in violation of the equal protection clause a Chicago ordinance which permanently barred persons convicted of certain offenses from obtaining a public chauffeur's license but exempted from the bar those who already had a public chauffeur's license who had previously been convicted of the same offenses. *Affirmed,* 434 U.S. 356 (1978).

The Seventh Circuit held that the distinctions made among the class of offenders were irrational regardless of the importance of the public safety considerations underlying the statute or the relevance of prior convictions to fitness to drive. *Id.* at 316. The court reasoned:

> Allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is per se likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings.

Id.

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[4] Colorado has a clear interest in abiding by the Interstate Compact to promote cooperation and reciprocity among the several states.

Burgess asserts that the distinction made in this case by the Defendants is irrational because two people convicted of the same crime in Colorado will be treated differently with respect to their privileges to operate a motor vehicle in Illinois. Burgess maintains that difference in treatment which derives only from the name of the state issuing the drivers license is irrational. He maintains that, although the Defendants might have an interest in insuring that the public streets and highways in Illinois are kept free of those who commit offenses which are roughly analogous to the Illinois Driving Under the Influence Statute, Colorado drivers who are similarly convicted of the offense are not kept off Illinois highways. And, Burgess asserts that there is no statistical or empirical basis showing that there is a greater likelihood of Illinois drivers being convicted of driving while ability is impaired in Colorado and returning to Illinois drive than there is if Colorado licensees were convicted of driving while ability impaired in Colorado who later drive in Illinois.

In response, the Defendants contend that state action cannot be violative of equal protection without a classification which amounts to discrimination between those persons affected by state action. *Confederation of Police v. City of Chicago*, 529 F.2d 89, 93 (7th Cir. 1976), *vacated on other grounds*, 427 U.S. 902, *on remand*, 547 F.2d 375 (1977). Further, the Defendants maintain that to support a claim for a violation of equal protection there must be state action which treats similarly situated groups differently. *United States v. Antelope*, 430 U.S. 641 (1977).

This Court concludes that Burgess's arguments must fail because Illinois has not made any irrational distinctions based upon state citizenship. Illinois simply does not have the authority to tell Colorado how and when it must grant and revoke the licenses of its own citizens. However, Illinois does have the right to determine when a license it has issued should be revoked, within certain parameters.

Further, this Court believes that it is a fair assumption that Illinois licensees will be driving in Illinois more often than Colorado licensees will drive in Illinois. Therefore, the Illinois legislature could reasonably conclude that Illinois drivers who had been convicted under an alcohol related driving offense in another state would present a greater threat to the safety of Illinois citizens than do Colorado drivers.

IV. The Double Jeopardy Claim

Burgess contends that by concluding that Burgess was guilty of driving under the influence under Illinois law and revoking his license based upon the Colorado conviction, the Defendants have necessarily subjected Burgess to two separate and successive jeopardies and punishments for a single offense contrary to the double jeopardy clause of the Fifth Amendment as applied to the states under the Fourteenth Amendment.

The Defendants argue that the dual sovereignty doctrine, as originally articulated and consistently applied by the Supreme Court, compels a conclusion that successive prosecutions by two states for the same conduct is not

barred by the double jeopardy clause. *See, Heath v. Alabama,* 474 U.S. 82 (1985). Because Illinois and Colorado are separate sovereigns, the Defendants contend that double jeopardy does not bar Illinois' action. *Id.* at 438.

This Court disagrees with the Defendants. In defining the dual sovereignty doctrine, the Supreme Court stated in *Heath*:

> When a defendant in a single act violates the "peace and dignity" of two sovereigns by breaking the laws of each, he has committed two distinct "offenses." (Citation omitted).

Id. at 88. In this case, Burgess has not committed a single act which violated the peace and dignity of both Colorado and Illinois. If, for instance, Colorado and Illinois were contiguous states and Burgess drove through each state in his condition, it could be argued that the dual sovereignty doctrine should be applied. However, that is clearly not the case here.[5]

Alternatively, the Defendants argue that, while the proceeding in Colorado was a criminal action, the license revocation in Illinois was an administrative action which merely deprived Burgess of a property interest and not a liberty interest. *See, People v. Lindner,* 127 Ill.2d 174, 535 N.E.2d 829, 833, 129 Ill.Dec. 64, 68 (Ill. S.Ct. 1989). The Defendants note that one Illinois court stated, in a case where the suspension of driving privileges was the only result in the case:

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[5] Further, there is no Illinois statute which even attempts to make the alleged acts committed in Colorado criminal. The Driver's Interstate Compact, Ill.Rev.Stat. ch. 95½, §6-701 *et seq.* appears to be used only as a regulatory device.

> Since imprisonment is not at issue, the penalty to a losing defendant does not constitute a deprivation of liberty.

116 Ill.2d 389, 507 N.E.2d 826, 830, 107 Ill.Dec. 673, 677 (Ill. S.Ct. 1987).

This Court agrees with the Defendants on this point and notes that other courts have recognized that the double jeopardy guaranty does not apply to certain civil litigation or administrative proceedings such as actions to remove a license to engage in a profession or business. *See, State v. Russell,* 227 Kan. 897, 610 P.2d 1122 (1980), *cert. denied,* 449 U.S. 983; *Attorney Grievance Committee v. Andresen,* 281 Md. 152, 379 A.2d 159 (1977); *Alexander v. State,* 129 Ga.App. 395, 199 S.E.2d 918 (1973); *see also,* Wayne R. LaFave and Jerold J. Israel, *Criminal Procedure – Criminal Practice Series,* Vol. 3, §24.1(b), n. 17-31, West Publishing Co. (1984).

In *United States v. Halper,* 490 U.S. 435, 448 (1989), the Supreme Court stated:

> *To that end, the determination whether a given civil sanctions constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve.* Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction is applied in the individual case serves the goals of punishment.
>
> These goals are familiar. We have recognized in other contexts that punishment serves the twin aims of retribution and deterrence. *See, e.g., Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168

> (1963) (these are the "traditional aims of punishment"). Furthermore, "[r]etribution and deterrence are not legitimate non-punitive government objectives." *Bell v. Wolfish,* 441 U.S. 520, 539, n. 20 (1979). From these premises, it follows that a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. *Cf., Mendoza-Martinez,* 372 U.S. at 169 (whether sanction appears excessive in relation to nonpunitive purpose is relevant to determination whether sanction is criminal or civil). *We therefore hold that under the double jeopardy clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as deterrent or retribution.* (Emphasis added).

Thus, under *Halper,* this Court must look to the sanctions imposed by Illinois against Burgess to determine whether it constitutes punishment. The effect of a conviction in another state is given under ch. 95½, §6-703 of the Illinois Revised Statutes. It provides in relevant part:

> Effect of a Conviction. (a) The licensing authority in the home state, *for purposes of suspension, revocation, or limitation of the license to operate a motor vehicle,* shall give the same effect to the conduct reported, pursuant to §6-702, as it would if such conduct had occurred in the home state, in the case of convictions for:
>
> * * *

> . . . 2. driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle. . . .
>
> * * *
>
> (c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in paragraph (a) of this Section, such party state shall construe the denominations and descriptions appearing in paragraph (a) hereof as being applicable to and identifying those offenses or violations of a substantially similar nature, and the laws of such party shall contain such provision as may be necessary to ensure that full force and effect is given to this Section. (Emphasis added).

Under this section, the effect of a conviction in another state can be only to suspend, revoke, or limit a person's driving privileges. The Driver's License Compact provides no authority to impose a sanction other than the suspension, revocation, or limitation of a driver's license.

Further, the Motor Vehicle Code provides that the Secretary of State cannot suspend a driver's license for more than a year except as specifically provided under the Code. *See*, Ill.Rev.Stat. Ch. 95½ §6-208(a).[6] Under the Driver's License Compact, Burgess can apply for a new

---

[6] The parties have not specifically argued what particular sanctions would be applicable in this case. However, it seems clear that the maximum sanction which would be imposed against Burgess would be the revocation of his license for a year.

license after a year. Ill.Rev.Stat. ch. 95½ §6-704. The licensing authority may refuse to issue him a new license only if it determines that it would not be safe to grant the person a new license. *Id.*

In light of the dangers presented by persons who commit alcohol related driving offenses, this Court concludes that the revocation of Burgess's license for one year (assuming he has given no other indications that allowing him to drive would endanger the citizens of Illinois), the maximum sanction which could be imposed, would only be remedial, and thus, this Court finds that the purpose of the Driver's License Compact is clearly remedial.

The purpose of the Driver's License Compact, which is codified in Illinois at Ill.Rev.Stat. ch. 95½, §6-700 *et seq.* and in Colorado at CRS 24-60-1101(I-VIII), is explicitly stated. Under the compact, the party states have made findings that:

> 1. The safety of their streets and highways as materially affected by the degree of compliance with state laws and local ordinances relating to the operation of motor vehicles.
>
> 2. Violation of such a law or ordinance is evidence that the violator engages in conduct which is likely to endanger the safety of persons and property.
>
> 3. The continuance in force of a license to drive is predicated upon compliance with laws and ordinances relating to the operation of motor vehicles, in whichever jurisdiction the vehicle is operated.

See, Ill.Rev.Stat. ch. 95½, §6-701(a). On the basis of those findings, the party states have declared that it is their policy to:

> Promote compliance with the laws, ordinances, and administrative rules and regulations relating to the operation of motor vehicles by their operators in each of the jurisdictions where such operators drive motor vehicles.
>
> Make the reciprocal recognition of licenses to drive and eligibility therefor just and equitable by considering the over-all compliance with motor vehicle laws, ordinances and administrative rules and regulations as a condition precedent to the continuance where issuance of any license by reason of which the licensee is authorized or permitted to operate a motor vehicle in any of the party states.

Ill.Rev.Stat. ch. 95½, §6-701(b).

Thus, the Driver's License Compact itself makes it clear that the purpose of the reciprocal recognition of driving convictions is primarily to fulfill the remedial purpose of preventing unsafe drivers from endangering citizens in the several states. There is nothing in the record to support a finding that the application of the Driver's License Compact is anything more than remedial in nature. Consequently, Plaintiff's claim of double jeopardy must fail.

CONCLUSION

The Court GRANTS the Plaintiff's Motion for Summary Judgment (#25) in part and DENIES it in part. Also, the Court GRANTS the Defendants' Motion for Summary

Judgment (#31) in part and DENIES it in part. The Clerk is directed to enter judgment in favor of the Defendants and against the Plaintiff on the privileges and immunities claim, the equal protection claim, and the double jeopardy claim. The Clerk is further directed to enter judgment in favor of the Plaintiff and against the Defendant on the due process claim. If attorney's fees are awarded by the Court, there will be an amended judgment entered later.

ENTERED this 15th day of July, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DAVID WAYNE BURGESS, Plaintiff, v. GEORGE RYAN, as Secretary of State of the State of Illinois, and STEPHEN B. SCHNORF, as Director of the Driver's Services Department of the Office of the Secretary of State, State of Illinois, Defendants.	)	Case No. 91-0132 (Filed Apr. 24, 1991).

ORDER

THIS MATTER CAME ON BEFORE THE COURT on April 7, 1991, on the application of the plaintiff pursuant to his first amended complaint for preliminary and permanent injunctive relief to cause the temporary restraining order heretofore entered by the court on February 22, 1991, be converted into a preliminary injunction. Pursuant to agreement of the parties and in order to accommodate an expedited briefing schedule, this mater was set on March 12, 1991, for hearing in order to address the issues raised in the plaintiff's complaint and first amended complaint for preliminary and permanent injunctive relief. Plaintiff appeared by his attorney Mr. John Bisbee and the defendants appeared by and through the Attorney General of the State of Illinois by Ms. Julie Weisenberg. After having considered the memoranda

submitted by the parties and having listened to extensive arguments of counsel, the court makes the following FINDINGS OF FACT:

1. Plaintiff in this case was and is a legal resident of the State of Illinois, residing at 1001 Derry Lane, Macomb, Illinois within the Central District of Illinois.

2. The plaintiff is employed as the director of security for an entity known as Duborneco, Inc., a corporation with its principal place of business in New York and with operations throughout the United States.

3. Plaintiff's duties as the director of security for Duborneco, Inc. include driving the chief executive officer of Duborneco, Inc. from place to place in locations throughout the United States, which duties plaintiff performed on the strength of a motor vehicle operator's license issued to him by the defendant Illinois Secretary of State's Office.

4. The plaintiff was arrested in Eagle County, Colorado on January 7, 1990, and charged with driving under the influence of alcohol and/or drugs under Colorado law, CRS 42-4-1202(1)(a).

5. After various proceedings in the County Court in and for the County of Eagle, State of Colorado, plaintiff on August 13, 1990, entered a plea of guilty to the misdemeanor offense under Colorado law of driving while ability impaired, prohibited by CRS 42-4-1202(1)(b) and defined under CRS 42-4-1202(1)(g) as follows:

> "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both

> alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects him to the slightest degree *so that he is less able than he ordinarily would have been,* either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle. (Emphasis added).

6. Under Colorado law, Colo.Rev.Stat. § 42-2-123(5)(b)(III) the conviction of driving while ability impaired results in 8 points being assessed against the driver's driving privileges, a total of 12 points being permitted in any given 12 month period pursuant to Colo.Rev.Stat. 42-2-123(1)(a).

7. Plaintiff in this case had never, before January 7, 1990, been arrested for or convicted of any driving offense and, since January 7, 1990, had not been arrested for or convicted for any driving offense and, accordingly, would not have been subject to the revocation of his driving privileges under Colorado law as a result of his conviction pursuant to a guilty plea for driving while ability impaired on August 13, 1990.

8. The County Court in and for the County of Eagle, State of Colorado, duly reported plaintiff's conviction of driving while ability impaired to the Colorado Department of Revenue, Motor Vehicles Division which in turn pursuant to the provisions of what is known as the Driver's License Compact, to which both Illinois and Colorado are parties and which is codified under Illinois law at 95 1/2, § 6-700-708, reported plaintiff's conviction to the Illinois Secretary of State which is the relevant

licensing authority respecting plaintiff's license to operate a motor vehicle.

9. Thereafter, on January 26, 1991, the defendant Illinois Secretary of State served a document entitled "Notice of Revocation" on the plaintiff that an order revoking his driver's license had been entered or said date and had been done "as a result of (plaintiff's) conviction in another state for the offense of operating a motor vehicle while under the influence of alcohol and/or drugs."

10. As defined under Illinois law, to wit, *Mills v. Edgar*, 178 Ill.App.3d 1054, 1057 (4th Dist. 1989), driving under the influence means "a person is under the influence of intoxicating liquor when as a result of drinking any amount of intoxicating liquor his mental and/or physical faculties are so impaired as to reduce his ability to think and act with ordinary care."

11. By notifying plaintiff that he had been convicted "in another state for the offense of operating a motor vehicle while under the influence of alcohol and/or drugs" whereas in fact, plaintiff had been convicted in Colorado of "driving while ability impaired" as hereinabove defined, the Notice of Revocation of plaintiff's operator's license upon which the administrative revocation was predicated pursuant to the Driver's License Compact, Ill.Rev.Stat. ch. 95 1/2, § 6-703 and Ill.Rev.Stat. ch. 95 1/2, § 6-206(a)6 was inaccurate.

12. Illinois provides a mechanism for post-deprivation procedure in Ill.Rev.Stat. ch. 95 1/2, §§ 2-118 and 6-206(c), but does not provide any mechanism for hearing

prior to the administrative action which the defendants took with respect to the plaintiff in this case.

13. The Illinois Secretary of State routinely treats driving while ability impaired convictions under Colorado law as driving under the influence under Illinois law for purposes of the Driver's License Compact, Ill.Rev.Stat. ch. 95 1/2, § 6-703.

14. Because his driving privileges are necessary to his livelihood, plaintiff would be immediately and irreparably harmed by the deprivation of his driving privileges if he is not afforded a meaningful hearing prior to the deprivation to contest whether he was in fact guilty of an offense which under Illinois law, Ill.Rev.Stat. ch. 95 1/2, § 6-206(a)6 would warrant the revocation of his driving privileges.

15. The interest of the State of Illinois as reflected in the authority granted to the defendant Secretary of State is substantial in keeping off the public streets and highways of the State of Illinois those who have been convicted of driving under the influence of alcohol as defined by Illinois law, but it is also in the interest of the State of Illinois to ensure that the driving privileges of its citizens are not revoked without due process of law.

16. For the plaintiff in this case who, for purposes of his employment is physically located in New York and at other points throughout the United States and whose duties include driving the chief executive officer of the company for which he works from place to place, a post-deprivation hearing would not provide an adequate remedy at law, because he would lose his job, and the plaintiff would be irreparably injured.

Based on the foregoing Findings of Fact, the court makes the following CONCLUSIONS OF LAW:

1. Plaintiff has no remedy at law against the Defendants in this case in their official capacities, the defendants being agents of the State of Illinois performing state functions under the Constitution and laws of the State of Illinois and are thereby shielded from an action at law by the Eleventh Amendment to the United States Constitution. *See, Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 238 (1985); *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 100 (1984); *Edelman v. Jordan,* 415 U.S. 651 (1974).

2. Additionally, in light of the Supreme Court's decision in *Dixon v. Love,* 431 U.S. 105 (1977), the defendants above named in their individual capacities might be entitled to qualified immunity from any damage suit plaintiff might bring under 42 U.S.C. § 1983.

3. Plaintiff has a property interest in his driver's license, which interest cannot be deprived him without due process of law. *Bell v. Burson,* 402 U.S. 535 (1971).

4. Generally speaking, the Due Process Clause of the Fourteenth Amendment requires that there be some kind of a hearing before the state deprives a person of liberty or property. *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 542 (1985); *Parham v. J.R.,* 442 U.S. 574, 606-607 (1979); *Memphis Light, Gas and Water Division v. Crabs,* 436 U.S. 1 (1978); *Goss v. Lopez,* 419 U.S. 565, 579 (1975); *Wolff v. McDonald,* 418 U.S. 557-558 (1974); *Zinnermon v. Burch,* 494 U.S. ___, 110 S.Ct. ___, 108 L.Ed.2d 100, 114-116.

5. In some circumstances, due process is satisfied by provision for a post-deprivation hearing or a common law tort remedy for erroneous deprivation. *See, Zinnermon v. Burch,* supra, 108 L.Ed.2d at 115; *Logan v. Zimmermon Brush Co.,* 455 U.S. 422, 436 (1982); *Ingraham v. Wright,* 430 U.S. 651, 682 (1977); *Mitchell v. W.T. Grant Co.,* 416 U.S. 600, 619-620 (1974); and *Dixon v. Love,* supra.

6. In order to determine what process is due and whether something other than a pre-deprivation hearing will suffice, this court is obliged to consider (i) the private interest affected by state action, (ii) the potential for erroneous deprivation based on the process used and whether different or additional procedural safeguards should be used, and (iii) the governmental interest involved including the cost and administrative burdens resulting from requiring different or additional safeguards. *Matthews v. Eldridge,* 474 U.S. 319 (1976), and *Dixon v. Love,* supra.

7. The court concludes that plaintiff's property interest here, his driver's license, which is directly tied to his means of livelihood (chauffeur) constitutes a significant interest affected by the actions of the defendants.

8. The court further concludes that the risk of erroneous deprivation without a pre-deprivation hearing in this case was significant because personnel in the Illinois Secretary of State's Office effectively classify *any* alcohol-related driving violation as "substantially similar" to the Illinois Drunk Driving Statute without any qualitative decision being made by anyone that the two statutes are substantially similar as to elements of the offenses. Here, the defendants have concluded that plaintiff was guilty of

driving under the influence as defined by Illinois law, to wit, Ill.Rev.Stat. ch. 95 1/2, § 11501(a)2 solely on the basis of his conviction in Colorado of driving while ability impaired by CRS 42-4-1202(1)(b) and (g), which statutes, this court concludes, for purposes of this hearing, define different driving offenses, in that under the Illinois DUI statute, one is guilty if his driving is affected to the extent that his ability to operate with ordinary care is reduced, an objective standard, whereas under the Colorado DWAI statute, a person is guilty if he is less able *than he ordinarily would have been* to exercise due care, drive safely, etc., a subjective standard. Here, the plaintiff has no opportunity before the implementation of defendant's administrative action to contest whether his driving conduct in Colorado violated Illinois' objective standard, a troublesome situation where, as here, his conviction under the Colorado DWAI statute does not give sufficient indications for due process purposes that it did.

9. A procedure allowing for an individualized hearing before taking any administrative action to revoke driving privileges for the purposes of determining whether or not the conviction in another state implicates the same elements and the same standard as does the Illinois DUI statute could have been used and should have been used to prevent or minimize the risk of erroneous deprivation which was likely in this case. The defendants could comply with due process safeguards by implementing a legislative, class based means to ensure that any administrative action they took pursuant to the Driver's License Compact, Ill.Rev.Stat. ch. 95 1/2, § 6-700-708 respecting plaintiff's conviction under the Colorado's Driving While Ability Impaired Statute, CRS

42-4-1202(1)(b) and (g) in law and in fact corresponding to the elements and standard set forth in the Illinois Driving Under the Influence Statute, Ill.Rev.Stat. ch. 95 1/2, § 11-501(a)(2).

10. Undoubtedly, if the Illinois Secretary of State in response to this order implements a procedure allowing for a predeprivation hearing for each person convicted under the traffic laws of a sister state with respect to which the Illinois Secretary of State intends to take administrative action, greater costs will be involved and greater administrative burdens will be created; however, this court believes that the cost and burden would be minimized if, as a first step, some properly trained person in the Secretary of State's Office made an analytical decision as to whether the statute of conviction of the other state truly is substantially similar in essential elements. The only procedure apparently used now is a computer coding of the offense from the other state. If the offense from the other state is alcohol related, it is automatically determined by the Illinois Secretary of State's Office to warrant the decision that the driver in question has effectively violated the Driving While Under the Influence law of Illinois, thereby inevitably leading to a notice of license action to that effect, and a revocation of license, without any possibility of a pre-deprivation hearing.

11. It is nevertheless in the interests of the State of Illinois and of the defendants to ensure that Illinois licensees, including plaintiff herein, are not deprived their privileges to operate motor vehicles and thereby deprived all rights and privileges appertaining thereto with resultant harm, economic and otherwise to said

individuals (particularly where that license is necessary to the furtherance of occupational and livelihood interests), as in this case, without adequate due process of law.

12. The court, therefore, concludes that the plaintiff, in the absence of a pre-deprivation hearing, would be deprived a significant property interest under circumstances where whatever post-deprivation procedures available pursuant to Ill.Rev.Stat. ch. 95 1/2, §§ 6-206 and 2-118 would not be sufficient under the criteria prescribed in *Dixon v. Love*, supra, and *Matthews v. Eldridge*, supra, to vindicate those private interests and, therefore, plaintiff will suffer immediate and irreparable harm if a preliminary injunction is not granted restraining and enjoining the defendants from revoking his license without affording him a pre-deprivation hearing.

13. By reason of (i) the plaintiff being deprived a significant property interest without a pre-deprivation hearing to determine whether or not the deprivation would be warranted; (ii) the substantial potential for erroneous deprivation based on the process used, in view of additional safeguards which could be employed, at minimal cost and burden to the State; and (iii) the fact that said costs and administrative burdens would not exceed the costs both to the plaintiff's personal interest and the interest of the state itself, the plaintiff has demonstrated a substantial likelihood of success on the merits of the instant litigation.

14. By reason of all the foregoing, the court concludes that the plaintiff has demonstrated that (i) no adequate remedy at law exists; (ii) that plaintiff will suffer irreparable harm absent injunctive relief; (iii) that

the irreparable harm suffered in the absence of injunctive relief outweighs the irreparable harm the respondent will suffer if the injunction is granted; (iv) the plaintiff has a reasonable likelihood of prevailing on the merits; and (v) the injunction will not harm the public interest.

15. The court concludes that a preliminary injunction restraining and enjoining the defendants, their agents and all others acting in concert with them from taking any action to deprive the plaintiff of his driving privileges without a predeprivation hearing to determine whether or not his conviction in Colorado of driving while ability impaired as defined by CRS 424-1202(1)(b) and (g) sufficiently implicated for due process purposes the elements and standards of the Illinois Driving Under the Influence Statute, Ill.Rev.Stat. ch. 95 1/2. § 11-501(a)2. *U.S. v. Rural Electric Convenience Coop Co.*, 922 F.2d 429, 432 (7th Cir. 1991).

On the basis for the foregoing Findings of Fact and Conclusions of Law:

IT IS HEREBY ORDERED that plaintiff's motion for a preliminary injunction should be and is hereby granted and the defendants herein, their agents, employees, attorneys, and all others acting in concert with them are hereby preliminarily restrained and enjoined during the pendency of this litigation from taking any action to deprive plaintiff of his driving privileges under Illinois law without first affording him a predeprivation hearing to determine whether or not his driving conduct in Colorado pursuant to which he was convicted of driving while ability impaired under CRS 42-4-1201(1)(b) and (g) were sufficiently similar for due process purposes to be

equated with driving under the influence as defined by Ill.Rev.Stat. ch. 95 1/2, § 11-501(a)2;

IT IS FURTHER ORDERED that this order shall remain in full force and effect until further order of this court;

IT IS FURTHER ORDERED that this order shall issue without the requirement that plaintiff post a bond.

IT IS FURTHER ORDERED that the court reserve the right to supplement the findings and conclusions herein as may be necessary prior to the entry of a final order within 14 days of this order.

ENTERED this 24th day of April, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DAVID WAYNE BURGRESS, Plaintiff, v. GEORGE RYAN, as Secretary of State of the State of Illinois, and STEPHEN B. SCHNORF, as Director of the Driver's Services Department of the Office of the Secretary of State, State of Illinois, Defendants.	Case No. 91-1032 (Filed May 10, 1991)

ORDER

Before the Court is a Motion by the Plaintiff to amend (#21) the Preliminary Injunction Order which was entered on April 24, 1991. As there is no objection to this Motion, the Court GRANTS this motion. The Court amends the Order of April 24, 1991 by adding the following language regarding the jurisdiction of the Court:

> This Court has jurisdiction of this cause under and pursuant to 28 U.S.C. §§ 1331 and 1343(3), this being an action brought by the plaintiff to redress the deprivation of rights, privileges and immunities secured plaintiff by the Constitution of the United States, such cause of action created by the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983.

ENTERED this 10th day of May, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DAVID WAYNE BURGESS, Plaintiff, v. GEORGE RYAN, as Secretary of State of Illinois, and STEPHEN B. SCHNORF, as Director of the Driver's Services Department of the Office of the Secretary of State, State of Illinois, Defendants.	)	Case No. 91-1032 (Filed Febr. 22, 1991)

ORDER

THIS MATTER COMING ON BEFORE THE COURT on the plaintiff's Motion for Temporary Restraining Order and the plaintiff having given one day notice to the defendants and the parties appearing before the court, the defendants opposing the entry of the temporary restraining order, and the court having reviewed the allegations of the verified Motion for Temporary Restraining Order and the allegations of the complaint, many of which are incorporated into the verified Motion for Temporary Restraining Order and being otherwise fully advised in the premises hereby makes the following findings:

1. The plaintiff would be irreparably harmed and injured only on the basis of a lack of a predeprivation hearing before the Secretary of State. If the court does not enter a temporary restraining order temporarily restraining and enjoining the defendants from interfering with plaintiff's driving privileges (solely on the basis of his having been convicted of driving while impaired in Colorado pursuant to statutory provision CRS 42-4-1202(1)(b)) and if the court does not order the defendants to temporarily, at least, restore plaintiff's driving privileges he will be irreparably harmed;

2. The issues in this case are primarily legal and can be briefed and heard within a specified period of time;

3. The defendants will not be unduly burdened by the court's entry of a temporary restraining order as prayed by the plaintiff nor will any significant public interest which outweighs the plaintiff's interest in the temporary restoration of his driving privileges be affected;

On the basis of the foregoing findings,

IT IS HEREBY ORDERED that until further order of this Court, the defendants be and hereby are temporarily restrained and enjoined from further interfering, without a predeprivation hearing before the Secretary of State, with plaintiff's driving privileges solely on the basis of his conviction on a guilty plea August 13, 1990 in Colorado pursuant to CRS 42-4-1202(1)(b).

IT IS FURTHER ORDERED that the defendants be and hereby are ordered to forthwith reinstate plaintiff's driving privileges and to rescind, until further order of

this court or until Burgess has been provided a predeprivation hearing, the order of revocation entered effective January 26, 1991;

IT IS FURTHER ORDERED that this order shall remain in full force and effect until the 13th day of March, 1991.

IT IS FURTHER ORDERED that this matter shall be set for hearing on plaintiff's Motion for Preliminary Injunction on the 13th day of March, 1991.

No bond is appropriate.

DONE IN OPEN COURT THIS 22nd DAY OF FEBRUARY, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: June 14, 1993

BEFORE:

Honorable John L. Coffey, Circuit Judge

Honorable Frank H. Easterbrook, Circuit Judge

Honorable Ilana Diamond Rovner, Circuit Judge

Nos. 91-2131, 91-2870, 91-2995 and 91-3281

DAVID W. BURGESS,
Plaintiff - Appellee, Cross - Appellant,

v.

GEORGE RYAN, as Secretary of State of the State of Illinois, and GREG O'CONNOR, Director of the Driver Services Department,
Defendants - Appellants, Cross - Appellees

Appeals from the United States District Court for the Central District of Illinois, Peoria Division No. 91 C 1032, Michael M. Mihm, Chief Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is REVERSED, with costs, and the case is REMANDED with instructions. The award of attorneys' fees, No. 91-3281, is REVERSED, with costs, in accordance with the decision of this court entered this date.

(1061-051993)

APPENDIX F

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 14, 1993.

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

DAVID WAYNE BURGESS, *Plaintiff-Appellee,* *Cross-Appellant,* Nos. 91-2131, 91-2870, v. and 91-3281 GEORGE RYAN, Secretary of State of Illinois, and GREG O'CONNOR, Director of the Driver Services Department, *Defendants-Appellants,* *Cross-Appellees.*	) Appeals from the United) States District Court for) the Central District of) Illinois, Peoria Division.)) No. 91-1032) Michael M. Mihm,) *Chief Judge.*

Order

Plaintiff-Appellee, Cross-Appellant filed a petition for rehearing on July 6, 1993. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No.

A-297

David Wayne Burgess,

Petitioner

v.

George Ryan

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including November 26, 1993.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 30

day of September, 1993.

APPENDIX H

5/11-501. Driving while under the influence of alcohol, other drug, or combination thereof

§ 11-501. Driving while under the influence of alcohol, other drug, or combination thereof. (a) A person shall not drive or be in actual physical control of any vehicle within this State while:

* * *

2. under the influence of alcohol;

* * *

APPENDIX I

5/6-703. Effect of conviction

§ 6-703. Effect of conviction. (a) The licensing authority in the home state, for the purposes of suspension, revocation or limitation of the license to operate a motor vehicle, shall give the same effect to the conduct reported, pursuant to Section 6-702, as it would if such conduct had occurred in the home state, in the case of convictions for:

* * *

2. Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle;

* * *

(c) If the laws of a party state do not provide for offenses or violations denominated or described in precisely the words employed in paragraph (a) of this Section, such party state shall construe the denominations and descriptions appearing in paragraph (a) hereof as being applicable to and identifying those offenses or violations of a substantially similar nature, and the laws of such party state shall contain such provision as may be necessary to ensure that full force and effect is given to this Section.

APPENDIX J

5/6-205. Mandatory revocation of license or permit – Hardship cases

§ 6-205. Mandatory revocation of license or permit – Hardship cases. (a) Except as hereinafter provided, the Secretary of State shall forthwith revoke the license or permit of any driver upon receiving a report of such driver's conviction of any of the following offenses:

* * *

2. Violation of Section 11-501 of this Code or a similar provision of a local ordinance relating to the offense of operating or being in physical control of a vehicle while under the influence of alcohol, other drug, or combination thereof;

* * *

(e) This Section is subject to the provisions of the Driver License Compact.[3]

---

[3] 625 ILCS 5/6-700 et seq.

APPENDIX K

5/6-206. Discretionary authority to suspend or revoke license or permit – Right to a hearing

§ 6-206. Discretionary authority to suspend or revoke license or permit; Right to a hearing.

(a) The Secretary of State is authorized to suspend or revoke the driving privileges of any person without preliminary hearing upon a showing of the person's records or other sufficient evidence that the person:

* * *

6. Has been lawfully convicted of an offense or offenses in another State, including the authorization contained in Section 6-203.1, which if committed within this State would be grounds for suspension or revocation;

* * *

(d) This Section is subject to the provisions of the Drivers License Compact.[7]

---

[7] 625 ILCS 5/6-700 et seq.

APPENDIX L

§ 42-2-123. Authority to suspend license – to deny license – type of conviction – points

(1)(a) The department has the authority to suspend the license of any driver who, in accordance with the schedule of points set forth in this section, has been convicted of traffic violations resulting in the accumulation of twelve points within any twelve consecutive months or eighteen points within any twenty-four consecutive months, or, in the case of a provisional driver, who has accumulated nine points within any twelve consecutive months, or twelve points within any twenty-four consecutive months, or fourteen points within the time period for which the license was issued, or, in the case of a minor driver, who has accumulated more than five points within any twelve consecutive months or more than six points within the time period for which the license was issued: except that the accumulation of points causing the subjection to suspension of the license of a chauffeur who, in the course of his employment, has as his principal duties the operation of a motor vehicle shall be sixteen points in one year, twenty-four points in two years, or twenty-eight points in four years, if all such points are accumulated while said chauffeur is in the course of his employment. Any provision of this section to the contrary notwithstanding, the license of a chauffeur who is convicted of a violation of section 42-4-1202(1) or (1.5) or leaving the scene of an accident shall be suspended in the same manner as if the offense occurred outside the course of employment. Whenever a minor driver receives a summons for a traffic violation, his parent or legal guardian or, if the minor is without

parents or guardian, the person who signed his application for a license shall forthwith be notified by the court from which such summons was issued.

* * *

(2)(b) The accumulation of points within the time periods provided in subsection (1) of this section shall not be affected by the issuance or renewal of any driver's, minor driver's, or provisional driver's license issued under the provisions of this article or the anniversary date thereof.

* * *

(5) Point system schedule:

* * *

(b) (I) Driving while under the influence or with an excessive alcoholic content pursuant to section 42-4-1202(1)(a) or (1.5)..... 12

* * *

(III) Driving while ability is impaired pursuant to section 42-4-1202(1)(b) 8

* * *

APPENDIX M

§ 42-4-1202. Driving under the influence – driving while impaired – driving with excessive alcoholic content – tests – penalties – useful public service program – alcohol and drug driving safety program

(1)(a) It is a misdemeanor for any person who is under the influence of alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, to drive any vehicle in this state.

(b) It is a misdemeanor for any person who is impaired by alcohol or by one or more drugs, or by a combination of alcohol and one or more drugs, to drive any vehicle in this state.

* * *

(f) "Driving under the influence" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs affects him to a degree that he is substantially incapable, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

(g) "Driving while ability impaired" means driving a vehicle when a person has consumed alcohol or one or more drugs, or a combination of both alcohol and one or more drugs, which alcohol alone, or one or more drugs alone, or alcohol combined with one or more drugs, affects him to the slightest degree so that he is less able than he ordinarily would have been, either mentally or

physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.

* * *

(2)(b) If there was at such time in excess of 0.05 but less than 0.10 grams of alcohol per one hundred milliliters of blood as shown by analysis of such person's blood or if there was at such time in excess of 0.05 but less than 0.10 grams of alcohol per two hundred ten liters of breath as shown by analysis of such person's breath, such fact shall give rise to the presumption that the defendant's ability to operate a vehicle was impaired by the consumption of alcohol, and such fact may also be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

* * *

APPENDIX N

23.29 Definition of Under the Influence of Alcohol

A person is under the influence of alcohol when, as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care.

APPENDIX O

92 ILLINOIS ADMINISTRATIVE CODE

Section 1040.38 Commission of a Traffic Offense in Another State

a) A person who has been convicted of a traffic offense in another state, which if committed in this State would be grounds for mandatory revocation under Section 6-205 of the Illinois Vehicle Code (Ill. Rev. Stat., 1981, ch. 95 1/2, Section 6-205) shall have his/her driving privileges revoked.

b) A person who has been convicted of a traffic offense in another state, which if committed in this State would be grounds for suspension or revocation under Section 6-206 of the Illinois Vehicle Code (Ill. Rev. Stat., 1981, ch. 95 1/2, Section 6-206), shall have his/her driving privileges reviewed, and shall be subject to the same action as if the offense(s) had occurred within this State.

APPENDIX P

STATE OF ILLINOIS SPRINGFIELD

NOTICE OF REVOCATION

Date of Revocation 01-26-91
License Number B622-1786-3266
PROJ. ELIG. 01-26-92

DAVID W. BURGESS
1001 DERRY LANE
MACOMB IL 61455

Pursuant to the provisions of the Illinois Vehicle Code, Section 6 206 A6 , YOU ARE HEREBY NOTIFIED that an Order revoking your Illinois drivers license or permit and your privilege to drive a vehicle or to obtain a license within this State, has been entered on the date shown above.

THIS ACTION IS TAKEN AS A RESULT OF YOUR CONVICTION IN ANOTHER STATE FOR THE OFFENSE OF OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR DRUGS. IF YOU LOST DRIVING PRIVILEGES IN ANOTHER STATE AND YOUR NORMAL DRIVING ACTIVITIES WERE ACTUALLY AFFECTED IN THAT STATE, CREDIT MAY BE GRANTED IN ILLINOIS FOR THAT TIME. TO REQUEST THIS CREDIT, PLEASE SEND A WRITTEN REQUEST FOR A FORMAL HEARING TO THE DEPARTMENT OF ADMINISTRATIVE HEARINGS AT EITHER ROOM 212, CENTENNIAL BUILDING, SPRINGFIELD, IL 62756, OR 183 WEST RANDOLPH, ROOM 200, CHICAGO, IL 60601.

The offense(s) which caused this action is/are:

Date of Offense	Date of Conviction	Traffic Violation
01-07-90	08-13-90	DUI/ALCOHOL
Ticket/ Case No.	**Reporting Court/State**	**Telephone Number**
1091746	COLORADO	

IF YOU ARE CONVICTED OF DRIVING WHILE YOUR PRIVILEGES ARE REVOKED, YOU WILL SERVE A MINIMUM TERM OF SEVEN (7) CONSECUTIVE DAYS IN JAIL OR THIRTY (30) DAYS OF COMMUNITY SERVICE. THE MAXIMUM PENALTY FOR A FIRST OFFENSE IS ONE (1) YEAR IN JAIL. FOR A SECOND OR SUBSEQUENT OFFENSE THE MINIMUM SENTENCE IS ONE (1) YEAR IN JAIL.

/s/ Stephen B. Schnorf
Stephen B. Schnorf, Director
Driver Services Department

APPENDIX Q

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS

David Wayne Burgess,

Plaintiff

V.

George Ryan, Secretary of State of the State of Illinois, and Steven B. Schnorf, as Director of the Drivers Services Department of the Office of the Secretary of State, State of Illinois,

Defendants

JUDGMENT IN A CIVIL CASE

(Filed July 15, 1991)

CASE NUMBER: 91-1032

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is entered in favor of the Defendants and against the Plaintiff on the privileges and immunities claim, the equal protection claim, and the double jeopardy claim. Further ordered that judgment is entered in favor of the Plaintiff and against the Defendants on the due process claim.

July 15, 1991
Date

John M. Waters
Clerk

/s/ Marty Leininger
(By) Deputy Clerk